

# The International Criminal Court that Africa wants



2010  
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Max du Plessis

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**Cover photograph** The prosecutor for the International Criminal Court Luis Moreno Ocampo, left, shakes hands with Kenyan President Mwai Kibaki as Kenyan Prime Minister Raila Odinga, right, looks on (AP Photo/Karel Prinsloo).

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Max du Plessis

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# About the author

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# Abbreviations and acronyms

|      |   |
|------|---|
| ASP  | Assembly of States Parties                                |
| AU   | African Union   |
| CAR  | Central African Republic                                  |
| CICC | Coalition for an International Criminal Court             |
| DRC  | Democratic Republic of the Congo                          |
| ICC  | International Criminal Court                              |
| ICTR | International Criminal Tribunal for Rwanda                |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| LRA  | Lord's Resistance Army                                    |
| MLC  | Movement for the Liberation of the Congo                  |
| OAU  | Organisation of African Unity                             |
| OTP  | Office of the Prosecutor (ICC)                            |
| SADC | Southern African Development Community                    |
| SCSL | Special Court for Sierra Leone                            |

# Executive summary

The work of the International Criminal Court (ICC) is currently much in focus. For the court, 2010 may well be the most important year yet. In May, states parties met in Kampala, Uganda for the much anticipated first review conference of the Rome Statute. The meeting allowed for debate about proposed amendments to the statute. Heading the agenda was the question of defining and operationalising the crime of aggression, a question whose answer has been begging since the Rome Statute establishing the ICC was adopted in 1998.

There is, however, much more at stake. As far as the court's relationship with African states is concerned, 2009 was arguably the most tumultuous in the ICC's short life span. The flashpoint was the arrest warrant issued by the court for Sudanese President Omar al-Bashir on charges of crimes against humanity and war crimes committed in the ongoing Darfur conflict.

The increasingly strained relations between the African Union (AU) and the court led to the adoption of a list of 'Recommendations by African States Parties to the ICC' in November 2009 which ambitiously grapples with some of the most vexing issues of international criminal justice confronted by the court in its inaugural decade. The most controversial proposal to emerge from this process – the amendment to the ICC's deferral regime (article 16) – was subsequently tabled by South Africa for consideration at the 8th ASP in The Hague in November 2009 and remains on the agenda for the 9th ASP in New York in December 2010.

These developments raise a number of questions that are likely to be debated (both formally and informally) in the year to come: the most important being whether article 16 of the Rome Statute will be amended in line with South Africa's proposal. ICC-Africa relations have clearly gone off-course of late; and whether interested parties are able to achieve a correction is an important

question for the viability of Africa's continued involvement in the international criminal justice project. In that regard, the monograph aims to:

- Describe the early support for the ICC on the African continent.
- Discern the reasons underlying the criticisms of the ICC that have arisen within the AU.
- Evaluate the merits of those criticisms.
- Propose various recommendations in an attempt to describe not only the type of ICC that Africa appears to want, but also to advocate the best means by which African states and the AU might engage with the ICC in order that the court may be improved in the pursuit of, or in response to, African interests.

The monograph accordingly demonstrates that the ICC's creation was shaped and supported by African nations that played a pivotal role at the Rome conference at which the court's statute was drafted and adopted. African nations highlighted their support for the court by the manner in which they ratified the Rome Statute after it became operative: Senegal was the first state in the world to ratify, and to date 31 African states – the largest regional bloc in the world – are a party to it. In response to early pressure by the US, a number of leading states on the continent expressed steadfast commitment to the ICC and did so by a keen understanding of, and recognition for, the international treaty obligations which flow from ratification from the Rome Statute.

The strong stand in support of the ICC that characterised Africa's earlier position on international criminal justice is, however, less evident today. Various complaints have been directed against the court from within Africa:

- First, there is the suggestion that the ICC is a hegemonic tool of western powers.
- Second is the argument that the ICC is an institution which is targeting or discriminating against Africa.
- Third, there is the suggestion that the ICC's focus only on Africa is undermining African efforts to solve its problems. This complaint is often expressed in terms of the Sudan referral – and amounts to a criticism that the court's work is undermining peace efforts or conflict resolution processes. African states through the AU have accordingly called on the Security

Council to defer the ICC's investigation into al-Bashir by invoking article 16 of the Rome Statute.

- Because the Security Council to date has chosen not to accede to the AU's request for a deferral of the Sudan investigation, a fourth complaint has arisen which is that the Security Council has ignored African calls for peace to be respected over justice.
- On the matter of the Security Council, a fifth objection is that the council (with its skewed institutional power) while entitled to send cases to the ICC, has made itself guilty of a double-standard since it has done so in respect of Sudan but has not done so in relation to, for instance, Gaza.
- A sixth objection is that the court has deigned to proceed against a sitting head of state of a country that is not party to the Rome Statute. The complaint essentially implicates questions about head of state immunity under customary international law as read with articles 98 and 27 of the Rome Statute.

The monograph notes that these objections have been expressed in various ways by African governments including those that are party to the Rome Statute, as well as in decisions taken by the AU and statements by its leaders. In practical terms, the responses of several African governments to developments with regard to the al-Bashir arrest warrant provide insight into the positions taken in respect of each of these complaints.

Having identified the complaints, the monograph evaluates the merits or otherwise of each in turn. In addition, the monograph offers recommendations in respect of each complaint.

There is an opportunity in appropriate fora for African states meaningfully to make recommendations that might shape the future work of the ICC. In so doing, African states have an opening to call for changes and improvements to an international institution that they were integrally part of creating.

The recommendations suggested in the monograph are but a starting point. The monograph notes that the process of changing and improving an international institution requires meaningful and engaged debate. It is also not a process that happens overnight. While African states make the case for various changes to the ICC and its method of working, there remains much to be heartened about in the interim. African nations – and most certainly African victims of horrifying crimes – have reason to celebrate rather than denounce

the work of the court. Africa has demonstrated a commitment to the ideals and objectives of the ICC: more than half of all African states have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions.

The recent opposition in some African quarters to the ICC, an opposition that has been aggravated by the ICC prosecutor's decision to seek al-Bashir's indictment, has negatively affected these efforts. The monograph suggests that the reasons for such opposition (or at least the motivations of some who advance them) appear to reflect an outdated and defensive view of sovereignty as a trump to human rights and justice. This is not only inconsistent with advances in international human rights worldwide, it is also today – if one takes the AU's documents at face value – ironically un-African. The provisions of the AU's Constitutive Act suggest that human rights are to play an important role in the work of the organisation.

The fulfilment of the aims and objectives of the ICC on the African continent – in particular through the complementarity regime – are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession and civil society. Meeting this need requires commitment to a collaborative relationship between these stakeholders and the ICC.

The monograph argues that it is imperative that Africa's 31 members of the ICC are encouraged to take seriously their obligations under the Rome Statute to ensure accountability for perpetrators, and that the 53 members of the AU are called to affirm rather than cheapen the organisation's commitment to eradicate impunity and ensure responsibility for perpetrators of crimes against humanity, war crimes and genocide. This effort is one that African victims of international crimes deserve. The ICC is an integral means by which Africans might end impunity on their continent. Civil society and others committed to the work of the ICC in Africa thus need urgently to proclaim the varied and compelling reasons why it can be trusted. A failure to do so means risking the court's work in Africa coming undone on the basis of misperceptions and inaccuracies.

The monograph's central imperative is captured in its final sentence, namely that 'there is thus much important work to be done so that the court may be improved in the pursuit of, or in response to, African interests – to ensure the ICC that Africa wants'.



# 1 Introduction

The International Criminal Court (ICC) has sparked immense interest since it opened its doors in 2002. As one noted commentator puts it: ‘Whether or not one is supportive of the International Criminal Court, any knowledgeable specialist has to admit that in the history of public international law it is a truly extraordinary phenomenon’.<sup>1</sup> It may just be ‘the most important institutional innovation since the founding of the United Nations’.<sup>2</sup>

A measure of the court’s rise is the number of states that have joined the ICC. The Rome Statute of the ICC has been ratified by 113 countries, of which 31 are African. Africa is also the largest regional grouping on the Assembly of States Parties (ASP); three ICC judges are African, including the first vice president; and the deputy prosecutor of the ICC is African.

The work of the ICC is currently much in focus. For the court, 2010 may well be the most important year yet. In May, states parties met in Kampala, Uganda for the much anticipated first review conference of the Rome Statute. The meeting allowed for debate about proposed amendments to the Rome Statute. In this regard article 121(1) of the Rome Statute states that:

After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

Heading the agenda was the question of defining and operationalising the crime of aggression, a question whose answer has been begging since the Rome Statute establishing the ICC was adopted in 1998. There is, however, much more at stake. As far as the court's relationship with African states is concerned, 2009 was arguably the most tumultuous in the ICC's short life span. The flashpoint was the arrest warrant issued by the court for Sudanese President Omar al-Bashir on charges of crimes against humanity and war crimes committed in the ongoing Darfur conflict.

The increasingly strained relations between the African Union (AU) and the court led to the adoption of a list of 'Recommendations by African States Parties to the ICC' in November 2009 which ambitiously grapples with some of the most vexing issues of international criminal justice confronted by the court in its inaugural decade. The most controversial proposal to emerge from this process – the amendment to the ICC's deferral regime (article 16) – was subsequently tabled by South Africa for consideration at the 8th ASP in The Hague in November 2009 and remains on the agenda for the 9th ASP in New York in December 2010. These developments raise a number of questions that are likely to be debated (both formally and informally) in the year to come: for present purposes the most important being whether article 16 of the Rome Statute will be amended in line with South Africa's proposal. ICC-Africa relations have clearly gone off-course of late; and whether interested parties are able to achieve a correction is an important question for the viability of Africa's continued involvement in the international criminal justice project.

Against this backdrop, the ICC's review conference – held from 3 May to 11 June 2010 – represented an unparalleled gathering of states, meeting on the continent, to discuss international criminal justice. The conference provided a unique and timely occasion for African governments to express their views on the importance of the ICC when national courts are unable or unwilling to prosecute genocide, war crimes and crimes against humanity, and to promote a fair, effective ICC. Securing justice for victims of such crimes limits impunity and in so doing may contribute to preventing new conflicts or the escalation of existing conflicts.

As we have seen, the primary focus of the review conference was to consider a limited number of amendments to the Rome Statute, and a large part of the conference was devoted to negotiations on the crime of aggression under the statute. However, a ‘general debate’ and ‘stocktaking’ of the Rome Statute system also formed an integral part of the conference. Notably, stocktaking was organised around four topics that have real significance for Africa: the impact of the Rome Statute system on victims and affected communities, state cooperation, complementarity, and peace and justice.

Robust, largely positive engagement by African governments in the review conference helped send the message that African governments support justice for victims and the role of the Rome Statute system in achieving this. Many African ICC states parties have already had relevant practice with stocktaking topics such as in cooperating with ICC requests or adopting implementing legislation. The AU called upon African states parties to ‘attend and effectively participate in the [Review] Conference’.<sup>3</sup> The participation of senior political leaders and officials from African states confirmed that many governments on the continent seek to promote effective development of the ICC and justice for atrocities more generally.

But beyond the immediacy of the review conference, there remains the longer-term project of ensuring that the ICC is a court that functions in the best interests of African victims of international crimes. While the review conference allowed for stocktaking, the more difficult task of implementing change lies ahead. In that regard, this monograph aims to:

- Describe the early support for the ICC on the African continent.
- Discern the reasons underlying the criticisms of the ICC that have arisen within the AU.
- Evaluate the merits of those criticisms.
- Propose various recommendations in an attempt to describe not only the type of ICC that Africa appears to want, but also to critically advocate the best means by which African states and the AU might engage with the ICC in order that the court may be improved in the pursuit of, or in response to, African interests.



# 2 The past: An ICC that Africa wanted

Africa's early support for the ICC is clear. Since the Rome Statute entered into force on 1 July 2002, it has been signed by 139 states and ratified by 113. Of those 113 states parties, 31 – a significant proportion – are African. Africa is also the largest regional grouping on the ASP, and while the court is situated in The Hague, its staff is drawn from around the world and, in accordance with UN rules on regional representation, includes a number of Africans.

For example, five of the court's 18 judges are African: Fatoumata Dembele Diarra (Mali), Akua Kuenyehia (Ghana), Daniel David Ntanda Nsereko (Uganda), Joyce Aluoch (Kenya), and Sanji Mmasenono Monogeng (Botswana). And one former judge, Navi Pillay, (South Africa) is now the UN High Commissioner for Human Rights. It is notable that in the March 2009 elections for new judges, 12 out of a total of 19 judicial candidates were Africans nominated by African governments. The deputy president of the ICC is Akua Kuenyehia and the deputy prosecutor is Fatou Bensouda, a highly respected Gambian who was formerly attorney-general and then minister of justice in her home state. In addition, Medard Rwelamira, a citizen of South Africa and Tanzanian by birth was the first director of the secretariat of the ASP, before his untimely passing in 2006.<sup>4</sup>

Africa is thus well represented on the ICC. This early siding with an institution designed to deal a blow to the perpetrators of international crimes overlaps with support for other international criminal tribunals in the 1990s. For example, Rwanda requested the UN Security Council to establish the International Criminal Tribunal for Rwanda (ICTR)<sup>5</sup> (the president of the ICTR, prior to her appointment as a judge of the ICC, was Judge Navi Pillay, a South African).<sup>6</sup> And Sierra Leone appealed to the UN to help deal with impunity in that country. That request gave Africa the Special Court for Sierra Leone (SCSL). In January 2002 the SCSL was established as a result of an agreement between the UN and Sierra Leone to try 'those who bear the greatest responsibility' for crimes against humanity and disrupting the peace process. The SCSL is a hybrid, staffed by local and international personnel, and has an international prosecutor.<sup>7</sup>

The history of the ICC's creation and the serious and engaged involvement of African states in that history demonstrates the ICC to be a court created in part by Africans and ultimately for the benefit of African victims of serious crimes. The high ideals and hard work that marked African states' participation in bringing the ICC to life in Rome should not too easily be forgotten.

African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised. In the period leading up to the Rome diplomatic conference, various ICC related activities were organised throughout Africa. This approach (replicated in other regional blocs) was consistent with the idea of enhancing universal support, and was also seen as fostering a better understanding of the substantive issues raised in the draft text of the statute.<sup>8</sup> Some 90 African organisations<sup>9</sup> joined the NGO Coalition for an International Criminal Court (CICC). They lobbied in their respective countries for the early establishment of an independent and effective international criminal court.<sup>10</sup>

It is also important to recall the active and important role played by the Southern African Development Community (SADC) in its support for the ICC. In ICC related negotiations after the International Law Commission presented a draft statute for an international criminal court to the UN General Assembly in 1993, experts from the group met in Pretoria in September 1997 to discuss their negotiation strategies and to agree on a common position in order to make a meaningful impact on the outcome of negotiations. This meeting

provided impetus for a continent-wide consultation process on the creation of the court.<sup>11</sup>

The participants agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement. These principles – which no doubt today would draw winsome criticism from African skeptics of the court – included a number of far reaching suggestions. They might be seen as a ‘wish list’ by states (at least in SADC) for an ICC that Africans hoped for. The principles include that:

- The ICC should have automatic jurisdiction over genocide, crimes against humanity and war crimes.
- The court should have an independent prosecutor with power to initiate proceedings *proprio motu*.
- There should be full cooperation of all states with the court at all stages of the proceedings.
- Stable and adequate financial resources should be provided for the ICC and states should be prohibited from making reservations to the statute.

On the basis of the principles submitted to them, SADC ministers of justice and attorneys-general issued a common statement that became a primary basis for SADC’s negotiations at Rome.<sup>12</sup> These principles also appeared in the Dakar declaration on the ICC as well as other declarations.<sup>13</sup> At a meeting on 27 February 1998, the council of ministers of the Organisation of African Unity (OAU), (now the African Union) took note of the Dakar declaration and called on all OAU member states to support the creation of the ICC. This resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.

During the Rome conference itself, several circumstances resulted in African states having a significant impact on the negotiations. For example, African delegates participating in the Rome conference had two guiding documents: the SADC principles and the Dakar declarations. Both the SADC principles and the Dakar declaration were in line with the principles of the ‘like-minded group’, the members of which were committed to a court independent from UN Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.<sup>14</sup>

Most of the work of the conference was carried out in working groups and informal working sessions. It is notable that Africans took the lead in either chairing or coordinating various issues. For instance, the Lesotho delegate was elected one of the vice-chairpersons of the conference and also coordinated the formulation of part 9 of the Rome Statute; and South Africa was a member of the drafting committee of the conference and coordinated the formulation of part 4 of the Rome Statute. As a consequence, South Africa was frequently invited to participate in the meetings of the bureau of the conference. As Schabas notes, at the Rome conference:

[a] relatively new force, the Southern African Development Community ..., under the dynamic influence of post-apartheid South Africa, took important positions on human rights, providing a valuable counter-weight to the Europeans in this field.<sup>15</sup>

It is thus beyond doubt that African states had the opportunity to ensure that the principles enshrined in the SADC and Dakar declarations were implemented to the extent possible. Regular African group meetings also contributed towards a coordinated effort.

#### Support for the ICC in Africa: the case of South Africa

South Africa's early support for the idea of a permanent international criminal court is well known. In particular, its influence at Rome in 1998 where the ICC's statute was drafted has been chronicled widely. It was thus to be expected that South Africa would become a party to the court's statute and scheme. On 17 July 1998 South Africa signed and ratified the Rome Statute, thereby becoming the 23rd state party. In order to give effect to its complementarity obligations under the Rome Statute, South Africa passed the Implementation of the Rome Statute of the International Criminal Court Act 27 2002 ('ICC Act').<sup>16</sup> The passing of the ICC Act was momentous: prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa.<sup>17</sup> South Africa was the first state in Africa to implement the Rome Statute's provisions into its domestic law, and to date it is one of only four African states to have done so. It has moreover created a dedicated unit – the Priority Crimes Litigation Unit, staffed by experienced prosecutors – to tackle the crimes outlawed under the statute, being genocide, crimes against humanity and war crimes.

Looking back then, the picture that emerges is a court created with extensive and deep involvement of African nations – a court in reality created to a large extent by Africans, in concert with other nations of the world who came together at Rome. One measure of African support for the ICC is discernible in the response by leading African nations to American efforts post-1998 to undermine the ICC.

The US was at first a vocal endorser of the idea of an international criminal court, with President Bill Clinton issuing calls for a permanent war crimes tribunal shortly before the Rome conference when addressing genocide survivors in Rwanda.<sup>18</sup> At the Rome conference, US opposition to the court appeared during the drafting process – an opposition which in the closing days of the conference had concretised to ensure that the US joined China, Israel and Iraq in voting against the statute. The Rome Statute was adopted on 19 July 1998 by a non-recorded vote of 120 in favour, seven against, 21 abstentions. Although the vote was non-recorded at the US's suggestion, the US, China, Israel and India made explicit that they had voted against the adoption of the statute. The other three states voting against the adoption of the statute were presumably Libya, Iraq and either Algeria, Qatar or Yemen.<sup>19</sup>

In Bill Clinton's last days in office the US signed the ICC statute, but Clinton's international advisors could not secure ratification of the treaty before President Bush came to power. Once in government, the Bush administration quickly took steps to set its face against the court, and lodged with the UN secretary general a letter on 6 May 2002 giving formal notice that the US has no intention of becoming a party to the Rome Statute. The letter also requested that the US declaration be reflected in the Rome treaty's official list – effectively cancelling out the US signature to the treaty that was entered by the Clinton administration on 31 December 2001.

This measure – referred to as 'unsigned' – set the US in outright opposition to the court. The action of withdrawing from a treaty prior to ratification is explicitly sanctioned by international law. Under article 18 of the 1969 Vienna Convention on the Law of Treaties, a state that has signed but not ratified a treaty is obliged to 'refrain from acts which would defeat the object and purpose of the treaty ... until it shall have made its intention clear not to become a party to the treaty'. Having made its intention clear by the aforementioned letter, the US then had a freer hand to use diplomatic means to oppose the court.

One method adopted by the US was to encourage states to enter into bilateral immunity agreements whereby states agreed not to send US citizens for trial at the ICC. The US reportedly extracted these agreements from more than 60 countries. Of those that submitted to American pressure and signed the agreements, the large majority was from some of the world's poorest (and therefore most pliable) nations. Only a few African countries, including Kenya, Lesotho, Mali, Namibia, South Africa and Tanzania refused to sign an agreement.

These countries were correct to reject US pressure to sign an immunity agreement. Many legal experts concluded that the bilateral agreements sought by the US government were contrary to the principles of international law. (The Europeans, for instance, responded by adopting a set of 'guiding principles' stating that the US proposed agreements are clearly inconsistent with the Rome Statute as well as with obligations arising from other international treaties). By signing such an agreement, a state party to the ICC would be violating article 18 of the Vienna Convention on the Law of Treaties, which obliges it to refrain from acts that would defeat the object and purpose of the statute. States parties that signed these agreements would also be in breach of various articles of the Rome Statute which require cooperation with, and assistance to, the court.

In the case of South Africa, the US had asserted a deadline of 30 June 2003 for the conclusion of such an agreement between the two states, backed up by the threat that failure to sign would result in the suspension of US military aid to South Africa. Having refused to succumb to US advances by the stated deadline, South Africa then found itself among 35 states blacklisted by the US on 1 July 2003.<sup>20</sup> According to the US embassy in Pretoria, South Africa's decision would cost it some 7.2 million dollars in military aid.<sup>21</sup>

The South African government's reasons for taking this position are instructive: they were said to be premised on that country's 'commitment to the humanitarian objectives of the ICC and the country's international obligations'. It might be noted that just prior to this announcement, on 20 July 2003 at a meeting for the formation of a South Africa-Kenya bi-national commission in Nairobi, Kenya, officials of both governments expressed their concern at the diplomatic intimidation displayed by the US in relation to article 98 agreements.

From this short overview of the court's early years it is possible to conclude that:

- The ICC's creation was shaped and supported by African nations that played a pivotal role at the Rome conference at which the court's statute was drafted and adopted.
- African nations highlighted their support for the court by the manner in which they ratified the Rome Statute after it became operative: Senegal was the first state in the world to ratify, and to date 31 African states – the largest regional bloc in the world – are a party to it.
- In response to early pressure by the US, a number of leading states on the continent expressed steadfast commitment to the ICC and did so by a keen understanding of, and recognition for, the international treaty obligations which flow from ratification from the Rome Statute.



# 3 The present: An ICC unwanted?

The strong stand in support of the ICC that characterised Africa's earlier position on international criminal justice is less evident today. This change in position tracks a broader 'push-back' against the ICC on the continent. It is not possible to identify with clarity or certainty the reasons for this apparent change of heart. However, set out below is an attempt at discerning the various complaints that have been directed against the court (or its model of international criminal justice) and which have originated from voices within Africa.

**First**, there is the suggestion that the ICC is a hegemonic tool of western powers.<sup>22</sup>

**Second**, and apparently related to the first allegation, is the argument that the ICC is an institution which is targeting or discriminating against Africa.<sup>23</sup>

**Third**, there is the suggestion that the ICC's focus only on Africa is undermining rather than assisting African efforts to solve its problems. This complaint is often expressed in terms of the Sudan referral – and amounts to a criticism that the court's work is undermining peace efforts or conflict resolution processes. African states through the AU have accordingly called on

the Security Council to defer the ICC's investigation into President al-Bashir of Sudan by invoking article 16 of the Rome Statute. The ICC's hitherto exclusive African focus has generated within the AU a call for the empowerment of the African Court on Human and Peoples' Rights to deal with serious crimes of international concern, as an apparent alternative to the ICC.

Because the Security Council to date has chosen not to accede to the AU's request for a deferral of the Sudan investigation, a **fourth** complaint has arisen which is that the Security Council has ignored African calls for peace to be respected over justice.

On the matter of the Security Council, a **fifth** objection is that the council (with its skewed institutional power) while entitled to send cases to the ICC, has made itself guilty of a double-standard since it has done so in respect of Sudan but has not done so in relation to, for instance, Gaza.

A **sixth** objection is that the court has deigned to proceed against a sitting head of state of a country that is not party to the Rome Statute. The complaint essentially implicates questions about head of state immunity under customary international law as read with articles 98 and 27 of the Rome Statute.

These objections have been expressed in various ways by African governments including those that are party to the Rome Statute, as well as in decisions taken by the AU and statements by its leaders. In practical terms, the responses of several African governments to developments with regard to the al-Bashir arrest warrant provide insight into the positions taken in respect of these complaints.

In the case of South Africa, reports emerged that during May 2009 al-Bashir – by then wanted by the ICC – had been invited to President Zuma's inauguration. If he were to arrive, the country faced an embarrassing situation that threatened to undermine the jubilation of inauguration day.<sup>24</sup> On the eve of the inauguration the government clarified that although the Sudanese government was invited, President al-Bashir was not. Al-Bashir chose not to visit South Africa at that time. Then July was dominated by the news that South Africa joined ranks with others at an AU meeting in Sirte, Libya, to support a 3 July AU resolution (apparently driven by Libyan leader Gaddafi) calling on its members to defy the international arrest warrant issued by the ICC for al-Bashir. Just shy of a month before that South Africa's justice minister at a different AU meeting in Addis Ababa had joined with other African states to affirm a deep commitment to the court.<sup>25</sup>

The Sirte resolution of the AU on 3 July – stressing that member states would not cooperate in the arrest and surrender of al-Bashir – was quickly condemned as a betrayal of Africa’s commitment to end impunity for human rights atrocities, and an international treaty violation. Only Botswana publicly distanced itself from the AU move, and in a letter dated 8 July 2009 to the ICC assured the court that:

As a State Party to the Rome Statute of the ICC, Botswana will fully abide with its treaty obligations and will support the International Criminal Court in its endeavours to implement the provisions of the Rome Statute.<sup>26</sup>

The letter follows a 4 July 2009 press release issued by the Government of Botswana in which Botswana stated that it:

Does not agree with [the AU decision] and wishes to reaffirm its position that as a State Party to the Rome Statute on the International Criminal Court (ICC) it has treaty obligations to fully cooperate with the ICC in the arrest and transfer of the President of Sudan to the ICC.

Because of its support for the resolution South Africa was quickly singled out for severe criticism both at home and abroad. One example of the criticism is a statement of 15 July 2009 signed by several South African civil society organisations and many concerned individuals calling upon President Zuma to honour South Africa’s treaty obligations by cooperating with the ICC in relation to the warrant of arrest issued for al-Bashir.

Virtually all of South Africa’s leading human rights organisations, including the South African Human Rights Commission, united around the call for South Africa’s government to respect its own law and constitution and to disassociate itself from the AU decision to refuse cooperation with the ICC. Several prominent South Africans also endorsed the statement including Desmond Tutu, former chairperson of the TRC; Richard Goldstone, former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia and Rwanda, and former judge of the Constitutional Court of South Africa; Dumisa Buhle Ntsebeza SC, former commissioner on the International Commission of Inquiry on Darfur appointed pursuant to UN Resolution 1564; and Professor John Dugard, Centre for Human Rights, Pretoria University.

The General Council of the Bar of South Africa issued its own strongly worded statement on the same day, in which it summed up the legal position as follows:

The issue of whether or not President Al-Bashir will be subject to arrest and surrender in South Africa should he enter the country, is determined by reference to our laws, including the Implementation of the Rome Statute of the ICC Act and our Constitution.

The political considerations that underlie the AU's concern with the conduct of the ICC and the UN Security Council in relation to Africa should not impede our authorities from performing their express legal obligations under our law should Al-Bashir enter South Africa.

Chapter 4 of our Implementation of the Rome Statute Act obliges our Central Authority, on receipt of a request from the ICC to enforce a warrant of arrest issued by that Court, with necessary accompanying documents, to approach a Magistrate who must endorse the ICC's warrant of arrest for execution where the accused is within our borders.<sup>27</sup>

After this directed criticism the South African government issued a response which purported to clarify that it was committed to its legal obligations in relation to the possible arrest of al-Bashir. On 31 July 2009 Dr Ntsaluba of foreign affairs explained as follows at a press conference:

South Africa is the (sic) State Party of the Rome Statute of the International Criminal Court and is therefore obliged to cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court (Article 86), and hence also in the execution of arrest warrants. It is worth noting that Article 87(7) of the Statute provides that, when a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties, or in the case of a United Nations Security Council (UNSC) referral to the UNSC.

Article 27 of the Rome Statute provides that the official capacity as Head of State or Government of an accused provides no exemption from criminal responsibility. Furthermore, Section 4(1) of the South African Implementation of the Rome Statute of the International Criminal Court Act also ousts the applicability of other domestic laws in respect of an accused, with the result that the immunity from prosecution that President El Bashir would normally have enjoyed in terms of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), is not be applicable.

Remarkably, at that press conference it was disclosed that an international arrest warrant for al-Bashir 'has been receive' (presumably from the ICC) and 'endorsed by a [South African] magistrate'. Ntsaluba explained that '[t]his means that if President El Bashir arrives on South African territory, he will be liable for arrest'.

Whether the public position adopted by the government at this 31 July 2009 media briefing was a reversal of the position it had adopted in supporting the 3 July 2009 AU decision, remains unclear. It is nonetheless a welcome clarification of South Africa's commitment to its treaty and domestic legal obligations. This position has since been re-stated on several occasions by government officials, notably by President Zuma. For example, amid reports that al-Bashir had been invited to attend the 2010 Soccer World Cup tournament hosted by South Africa, Zuma is reported to have confirmed that al-Bashir would face arrest if he arrived because 'South Africa respects the international law and certainly we are signatories (of the ICC statute), we abide by the law'.<sup>28</sup>

Other African state parties have also faced a similar situation relating to al-Bashir visiting their country on official business, in particular Uganda and Nigeria.<sup>29</sup> While al-Bashir avoided travelling to these states for fear of arrest (or so that the states concerned might avoid diplomatic embarrassment), he has most recently visited Chad (also a state party to the ICC) to take part in a meeting of leaders and heads of state of the Community of Sahel-Saharan States, on 22 July 2010.

Chad's decision not to arrest al-Bashir comes at the same time as the AU reiterating its call for African states not to cooperate with the ICC in arresting the Sudanese president. At its 22 July 2010 AU summit, the AU re-stated its Sirte decision on non-cooperation. The most recent AU decision clearly indicates

that member states' concerns with the court remain unchanged from 2009 – largely because of the al-Bashir warrant and the failure of the Security Council to accede to the AU's request for a deferral under article 16 of the Rome Statute. At the July 2010 summit Malawian President Bingu wa Mutharika, current chairperson of the AU, raised concerns about threats to state sovereignty in the context of the al-Bashir case:

To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for for so many years ... There is a general concern in Africa that the issuance of a warrant of arrest for ... al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union charter. Maybe there are other ways of addressing this problem.<sup>30</sup>

At the same gathering of African heads of state, chairperson of the AU Commission, Jean Ping, was more pointed in his criticisms of the ICC and its prosecutor:

We have to find a way for these entities [the protagonists in Sudan] to work together and not go back to war ... This is what we are doing but Ocampo doesn't care. He just wants to catch Bashir. Let him go and catch him ... We are not against the ICC ... But we need to examine their manner of operating. There are double standards. There seems to be some bullying against Africa.<sup>31</sup>

Coming less than a month after the success of the ICC review conference, these statements by the AU leadership and decisions of its member states are a clear indication that despite the hosting of the review conference and high-level commitment of African states parties evidenced in their official representation, declarations and pledges, deep concerns among African states about the ICC remain.

# 4 Analysing the complaint and making recommendations

The mixed signals from African states parties – with the notable exception of Botswana – about the ICC and certainly the 3 July 2009 and 22 July 2010 AU decisions and related AU criticisms of the court suggest that the wider political misgivings in Africa about the ICC continue to resonate. It is thus important to consider the various complaints about the court that have been identified above, in order to consider their merits (or otherwise).

After each of the complaints has been analysed, the monograph proposes various recommendations which might be of assistance for African states as they navigate a future which includes – through the express choice by a majority of the continent’s nations – obligations to support and cooperate with an international criminal court which is actively engaged on the continent.

## **CLAIM 1: THE ICC IS A ‘WESTERN COURT’ UNFAIRLY FOCUSED ON AFRICA**

The suggestion that the ICC is a hegemonic tool of western powers which is targeting or discriminating against Africa, has been expressed in various fora. For instance, the chairperson of the AU Commission, Jean Ping, reportedly

expressed Africa's disappointment with the ICC in noting that rather than pursuing justice around the world – including in cases such as Colombia, Sri Lanka and Iraq<sup>32</sup> – the ICC was focusing only on Africa and was undermining rather than assisting African efforts to solve its problems. The BBC quoted Ping as complaining that it was 'unfair' that all those indicted by the ICC so far were African. While purporting to confirm that '[the AU] is not against international justice', he has apparently lamented that '[i]t seems that Africa has become a laboratory to test the new international law'.<sup>33</sup>

Similarly, the renowned African scholar, Mahmood Mamdani, has proclaimed the more sophisticated (but also related) notion that the ICC is part of some new 'international humanitarian order' in which there is (to Mamdani) the worrying emphasis 'on big powers as enforcers of justice internationally'.<sup>34</sup>

Part of his thesis is that the ICC is a component of this new order, an order which 'draws on the history of modern Western colonialism', and that the ICC shares an aim of 'mutual accommodation' with the world's only superpower: a fact which to Mamdani 'is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo', given that all of these 'are places where the United States has no major objection to the course chartered by ICC investigations'.<sup>35</sup> Mamdani concludes this line of reasoning by stating:

Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.

To similar effect but in more strident language are the claims by Rwanda's President Kagame portraying the ICC as a new form of 'imperialism' that seeks to 'undermine people from poor and African countries, and other powerless countries in terms of economic development and politics'.<sup>36</sup>

The danger with each of these arguments is that they will find traction – not surprisingly – with dictators and their henchmen who seek reasons to delay or resist being held responsible under universally applicable standards of justice. But compounding matters is the fact that each of the arguments is not substantiated by the true facts, or, perhaps worse (even if unwittingly so), is a

distortion of the true facts. As one commentator has pointed out, the danger is that ‘the rhetoric of condemnation – that the ICC is an agent of neocolonialism or neo-imperialism, that is it anti-African – may so damage the institution that ... it is simply abandoned’.<sup>37</sup>

It is therefore important to stress that such claims of ‘unfair’ targeting are ultimately devoid of substance.<sup>38</sup>

The founding document of the ICC is the Rome Statute, which was adopted after the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome on 17 July 1998. The Rome Conference was specifically aimed at attracting states and non-governmental organisations so that they might debate and adopt a statute which would form the basis for the world’s first permanent international criminal tribunal.

The ICC is a tool for justice in a continent where impunity (the polar opposite of justice) has been emblematic. The importance of international criminal law for the African continent is starkly highlighted by an (African) senior legal adviser of the ICC’s Registry:<sup>39</sup>

No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa’s determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes whenever they occur.

The ICC is a call to responsibility for persons guilty of ‘the most serious crimes of concern to the international community as a whole’.<sup>40</sup> In this respect it takes seriously the words of Justice Robert Jackson, chief prosecutor at Nuremberg, who famously said that letting major war criminals live undisturbed to write their memoirs in peace ‘would mock the dead and make cynics of the living’.<sup>41</sup> The function of a trial in the ICC is thus first and foremost a proclamation that certain conduct is unacceptable to the world community. That may sound like an obvious statement, particularly to a domestic law prosecutor, but it is not one which international law has always embraced. While war crimes are committed every day and whole races have been defined by their experience of genocide or

crimes against humanity, international laws designed to punish these acts have, for a variety of political reasons, only been put into practice at Nuremberg and Tokyo after WWII, and in the 1990s by the creation of The Hague tribunals.

This very limited outpouring of indignation has for too long sent out an insidious message at the international level that to a large degree war crimes and crimes against humanity are followed by impunity. For anyone committed to the notion of human rights, the message must change. As Kofi Annan reminded when observing the International Day of Reflection on the 1994 Genocide in Rwanda:

We have little hope of preventing genocide, or reassuring those who live in fear of its occurrence, if people who have committed this most heinous of crimes are left at large, and not held to account. It is therefore vital that we build and maintain robust judicial systems, both national and international – so that, over time, people will see there is no impunity for such crimes.<sup>42</sup>

The ICC and national criminal law systems working to complement it are the means by which we can cure this defect in the international legal system. The act of punishing particular individuals – whether the leaders, or star generals, or foot soldiers – becomes an instrument through which individual accountability for massive human rights violations is increasingly internalised as part of the fabric of our international society. At the same time, it is a method by which we put a stop to the culture of impunity that has taken hold at the international level, and by which we provide a public demonstration of justice. The ICC, building on the work done by The Hague tribunals, is the means by which such a public account of justice is now possible in respect of every crime set out in the Rome Statute. In that regard, it is of singular importance to note – as the recent furore over the ICC's call for al-Bashir's arrest highlights – that no one, not even a serving head of state, will be able to claim immunity from the jurisdiction of the court.

It is of obvious concern then that the ICC has come under such vitriolic attack from within Africa and by scholars associated with Africa. How valid are the attacks on the ICC? And in discussing an ICC that Africa wants, what lessons (if any) might be drawn from the fact that these attacks have been made?

## A court by and for Africans

The suggestion that the ICC is the creation of Western powers couldn't be further from the truth. It is only by ignoring the history of the court's creation and the serious and engaged involvement of African states in that history that one can assert that the ICC is a western court. The assertion is also belied by the court's composition. While the ICC is situated in The Hague, its staff is drawn from around the world and in accordance with UN rules on regional representation, includes a number of Africans.

As pointed out earlier, of the 18 judges first appointed to sit on the ICC, four are from Africa,<sup>43</sup> the deputy president of the court is an African, Akua Kuenyehia, and the deputy prosecutor is Fatou Bensouda, a highly respected Gambian who was formerly attorney-general and then minister of justice in her home state. In addition, Medard Rwelamira, a citizen of South Africa and Tanzanian by birth was the first director of the secretariat of the Assembly of States Parties, before his untimely passing in 2006.

The ICC is not a tool designed for use specifically in the least developed and developing countries in Africa and Asia. This view is demeaning to Africans more generally, but more specifically does no justice to the high ideals and hard work that marked African states' participation in bringing the ICC to life in Rome. Thus:

... [c]ontrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, [a closer inspection of] the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.<sup>44</sup>

We have also seen how African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised.

In the period leading up to the Rome diplomatic conference, various ICC-related activities were organised throughout Africa. This approach

(replicated in other regional blocs) was consistent with the idea of enhancing universal support, and was also seen as fostering a better understanding of the substantive issues raised in the draft text of the statute.<sup>45</sup> Some 90 African organisations joined the NGO Coalition for an International Criminal Court (CICC), and lobbied in their respective countries for the early establishment of an independent and effective international criminal court.<sup>46</sup>

Also forgotten by those who would label the court ‘western’, is the active and important role played by the Southern African Development Community (SADC) in its support for the ICC, a role described earlier and which need not be repeated here. It is enough to stress that on the basis of commonly agreed principles, SADC ministers of justice and attorneys-general issued a joint statement that became a primary basis for the SADC’s negotiations at Rome.<sup>47</sup>

And then, African involvement during the Rome conference itself meant that African states had a significant impact on the negotiations; in particular helping to ensure a court independent from Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.<sup>48</sup> In sum, the:

Southern African Development Community ..., under the dynamic influence of post-apartheid South Africa, took important positions on human rights, providing a valuable counter-weight to the Europeans in this field.<sup>49</sup>

It is thus beyond doubt that African states had the opportunity to ensure that ‘African’ principles were implemented to the extent possible. Regular African group meetings also contributed towards a coordinated effort. The true picture that emerges then is a court created with extensive and deep involvement of African nations – a court in reality created *by* Africans, in concert with other nations of the world who came together at Rome.

It is also a court which counts amongst its members such a significant coterie of African nations that Africa today is the largest regional bloc represented at the ICC. After the statute was completed, in February 1999 Senegal became the first state party to ratify the Rome Statute. Steadily following suit were a host of African states parties so that today the court enjoys – at least on paper – significant support in the region.

To date, the Rome Statute has been signed by 139 states and 113 states have ratified it.<sup>50</sup> Of those 113 states a very significant proportion – 31 – are African.<sup>51</sup> Of the 53 African Union nations, Africa boasts as states parties to the Rome Statute: Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

Aside from the fact of continent-wide ratification of the Rome Statute, African commitment to the ICC, and to the cause of international justice, has been demonstrated by for instance the strategic partnership agreement signed at the EU-Africa summit in Lisbon in December 2007 which proclaims a joint commitment that ‘crimes against humanity, war crimes and genocide should not go unpunished and their prosecution should be ensured’.<sup>52</sup> This commitment reflects an understanding that responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone. It is a commitment which was earlier reflected by the African Commission on Human and Peoples’ Rights in its 2005 Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, in which the commission called on civil society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute.

In short, suggestions that the court is a western creation, or anti-African, must defeat the overwhelming evidence of African involvement in the court. The African support for the ICC described above thus leads to an important conclusion: the court, and the Rome Statute which underpins its substance and processes, was regarded by Africa’s states parties as being an institution which is *for* Africa. That is, the court has been regarded by the majority of Africa’s leaders as supportive of African ideals and values, including the goal of ridding the continent of its deserved reputation as a collage of despots, crackpots and hotspots where impunity for too long has followed serious human rights violations.

## The ICC in Africa: invited but not welcome?

The ICC is currently considering five situations. Three of those arise from so-called 'state referrals' from Democratic Republic of Congo, Uganda, and Central African Republic, all states parties to the Rome Statute. The fourth has come to the court by a Security Council referral requesting the ICC to consider the serious crimes that have been committed in Sudan, which has not ratified the Rome Statute. The most recent situation – involving Kenya's post-election violence – is the first example of the prosecutor's exercise of his *proprio motu* powers. In addition to these, the court is also considering violations in Côte d'Ivoire, which has also not ratified the Rome Statute but which has made a declaration in accordance with article 12(3), which allows a non-party state to lodge a declaration with the registrar of the court accepting the ICC's jurisdiction for specific crimes.

In what follows, a short description is provided of each of the cases currently before the ICC with a discussion thereafter of the practice of state referral. While geography tells us that these are all African situations, that fact alone cannot prove that the ICC has a discriminatory practice of choosing African violations over those from other parts of the world. Here is why.

### Current investigations following state referrals

The Office of the Prosecutor (OTP) is currently investigating the situations in the Democratic Republic of the Congo, Uganda and the Central African Republic following referrals from the respective governments. It is important to consider these referrals in greater detail to appreciate their significance for Africa and the ICC respectively.<sup>53</sup>

The Ugandan government referred the situation in its country to the prosecutor in December 2003, and an investigation was initiated in July 2004. The investigation has focused on northern Uganda where numerous atrocities have been committed against the civilian population. The crimes under investigation include crimes against humanity and war crimes. In July 2005, the court issued warrants for the arrest of five senior commanders of the Lord's Resistance Army (one of whom is now deceased), including its leader, Joseph Kony. The OTP continues to seek the cooperation of relevant members of the international community for the arrest and surrender of the remaining commanders.

In March 2004, Democratic Republic of the Congo authorities referred the situation in the country involving crimes within the jurisdiction of the court to the OTP. An investigation was opened in June 2004 and, having analysed the crimes within the court's jurisdiction and identified the gravest crimes, the OTP has focused its initial investigations on the Ituri region.

In February 2006, the ICC issued a warrant of arrest for Thomas Lubanga, president of the Union of Congolese Patriots (an armed group operating in Ituri province) on charges of enlisting, conscripting and using child soldiers. Lubanga was arrested and surrendered to the ICC in March 2006.<sup>54</sup> His trial was due to begin on 23 June 2008 but was halted on 13 June 2008 when the court's pre-trial chamber ruled that the prosecutor's refusal to disclose potentially exculpatory material had breached Lubanga's right to a fair trial. The prosecutor had obtained the evidence from the UN and other sources on the condition of confidentiality, but the judges ruled that the prosecutor had incorrectly applied the relevant provision of the Rome Statute and, as a consequence, 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'.

The ICC also issued a warrant for the arrest of Germain Katanga, former senior commander of the Patriotic Forces of Resistance in Ituri in July 2007. He is charged with crimes against humanity and war crimes. Katanga has since been surrendered to the court by the Congolese government,<sup>55</sup> an example which provides evidence of African cooperation with the ICC in practice rather than merely on paper.

The third person to be surrendered to the court was Mathieu Ngudjolo Chui, a colonel in the Congolese armed forces and alleged former leader of the National Integrationist Front. The charges against him, which are yet to be confirmed, are in respect of war crimes and crimes against humanity. Following a decision of the pre-trial chamber, the cases against Chui and Katanga have now been joined.

On 28 April 2008, the pre-trial chamber unsealed the warrant of arrest against Bosco Ntaganda, former deputy chief of general staff for military operations of the *Forces patriotiques pour la libération du Congo*. He is alleged to have enlisted, conscripted and used children under the age of 15 years for active participation in hostilities in Ituri between July 2002 and December 2003. Ntaganda is still at large.

The prosecutor announced the opening of an investigation into the situation in Central African Republic in May 2007, following a referral in December 2004.<sup>56</sup> The OTP received information from Central African Republic authorities, non-governmental organisations and international organisations regarding alleged crimes. As is the case in the other investigations, the focus has been on the most serious crimes, most of which were committed between 2002 and 2003. The situation in Central African Republic has been noteworthy for the particularly high number of crimes involving sexual violence.<sup>57</sup>

The first person to have been arrested (by the Belgian authorities) in relation to this investigation is Jean-Pierre Bemba Gombo, president and commander-in-chief of the Movement for the Liberation of Congo, and former vice president of the DRC. He is alleged to be responsible for the commission of war crimes and crimes against humanity in Central African Republic, from about 25 October 2002 to 15 March 2003. He was arrested by Belgian authorities on 24 May 2008 on a warrant issued by the court, surrendered to the ICC on 3 July 2008, and transferred to its detention centre in The Hague.

## The court's screening process

It is so that the OTP's current cases are but a small minority of matters that the ICC has been asked to investigate. However, before conclusions can be drawn about the African focus of the court's docket of cases, it is necessary to consider the process by which cases are screened.

As a starting point it might be noted that the OTP has adopted an impressively open and transparent approach to its work.<sup>58</sup> The OTP has explained its strategies and policies in public documents and – within the necessary constraints of confidentiality – attempted to justify the exercise of its discretion. For example, article 15(6) of the Rome Statute requires the prosecutor to inform those who have provided information concerning a possible prosecution when he concludes that there is no reasonable basis to proceed further. The prosecutor has interpreted the provision generously and – as we shall see below – has issued public and detailed statements explaining his decision not to investigate crimes committed in Iraq and Venezuela, and has issued more general comments explaining why situations fall outside the jurisdiction of the ICC.

The OTP receives numerous submissions from various sources alleging the commission of crimes within the jurisdiction of the court. A summary of the submissions received by the OTP is publicly available.<sup>59</sup> Just over a year after the Rome Statute entered into force, the court, through the prosecutor, had received over 650 communications. It is important to consider these complaints. They come to the ICC a variety of sources, including states parties and non-party states, and NGOs and individuals.<sup>60</sup> As will be seen they reveal a disturbing lack of understanding about the ICC and the court's functioning.

Fifty of the complaints contained allegations of acts committed before 1 July 2002. This is problematic because the ICC's jurisdiction is forward looking, and it does not have retrospective jurisdiction over acts committed prior to 1 July 2002. A number of communications alleged acts which fall outside the subject matter of the court's jurisdiction, and complained about environmental damage, drug trafficking, judicial corruption, tax evasion and less serious human rights violations that do not fall within the ICC's remit.

Thirty-eight complaints alleged that an act of aggression had taken place in the context of the war in Iraq in 2003. The problem here is that the US is not a party to the Rome Statute, and in any event, the ICC has been unable to exercise jurisdiction over alleged crimes of aggression until the crime was properly defined. Two communications referred to the Israeli-Palestinian conflict. The difficulty here is that Israel is not a party to the statute, and the Palestinian authority is not yet a state and so cannot be a party. By early 2006 the prosecutor's office recorded that it had received 1 732 communications from over 103 countries, and that 80 per cent of those communications were found to be 'manifestly outside [the Court's] jurisdiction after initial review'.<sup>61</sup>

In short, the overwhelming number of communications directed at the OTP is simply not actionable. That fact alone places in better perspective the actual – and significantly smaller – number of communications which have lawfully been open for consideration by the OTP for possible investigation. The court has thus dealt quickly and effectively, but also transparently, with manifestly unfounded communications, which is evidence of the robustness of its screening methods.

The approach adopted by the OTP in screening these submissions will be discussed in detail below, and results ultimately in a decision as to whether there is a reasonable basis to proceed with an investigation. The policy of the OTP is to maintain the confidentiality of the analysis process, in accordance with the

duty to protect the confidentiality of senders, the confidentiality of information submitted and the integrity of analysis or investigation.<sup>62</sup>

In the great majority of cases, where a decision is taken not to initiate an investigation on the basis of communications received, the OTP submits reasons for its decision only to senders of communications. This policy is consistent with rule 49(1) of the court's Rules of Procedure and Evidence, and is necessary to prevent any danger to the safety, well-being and privacy of senders and helps to protect the integrity of the analysis process. However, in the interest of transparency, the OTP may make publicly available its reasons for decision where three conditions are met:

- The situation has warranted intensive analysis
- The situation has generated public interest and the fact of the analysis is in the public domain
- Reasons can be provided without risk to the safety, well-being and privacy of senders.

Accordingly, in the interests of transparency, the OTP made available its decisions in relation to Iraq and Venezuela, both of which are available on the ICC's website.<sup>63</sup> Five unspecified situations were reported to be subject to ongoing examination, although their identity was not publicly disclosed.<sup>64</sup> Among them are the Central African Republic, which has since been referred to the court, and Côte d'Ivoire, which has made a declaration under article 12(3). As Schabas points out, that 'leaves three remaining situations about which we can only speculate. Columbia and Afghanistan would be good candidates for the list'.<sup>65</sup>

The responses to information received regarding the alleged commission of crimes in Venezuela and Iraq illustrate how this process functions in practice.<sup>66</sup> These examples are useful given the complaint that the ICC is unfairly skewing its attention in favour of African states. Even if one disagrees (legally or otherwise) with the OTP's approach for refusing to act on requests for investigation, a reading of those reasons reveals that there is little basis for suggesting that the ICC is a court which 'unfairly' discriminates in its selection of certain situations over others.

Starting with Venezuela, most of the information submitted to the OTP related to crimes alleged to have been committed by the Venezuelan

government and associated forces. One complaint related to crimes alleged to have been committed by groups opposed to the government. In his response, the prosecutor emphasised his duty to analyse the information received on potential crimes in order to determine whether there was a reasonable basis on which to proceed with an investigation.<sup>67</sup> He also stated that the analysis of the situation in Venezuela was conducted under article 15 of the statute since no state referral had been received.

The OTP reviewed the information provided, together with additional material obtained from open sources, media reports and reports of international and non-governmental organisations. The office noted that, as Venezuela had ratified the Rome Statute in July 2000, the court had jurisdiction over crimes perpetrated on the territory or by nationals of Venezuela after 1 July 2002, when the statute entered into force. Because a significant number of the allegations referred to incidents alleged to have occurred prior to 1 July 2002, the OTP focused only on those that fell within the temporal jurisdiction of the court.

In the view of the OTP, the available information did not provide a reasonable basis to believe that the crimes against humanity allegedly perpetrated against opponents of the Venezuelan government were committed as part of a widespread or systematic attack against any civilian population, as required under article 7(1) of the statute. The allegations relating to crimes against humanity committed by groups opposed to the government were found, with the exception of a few incidents, to be very generalised; they could not, furthermore, be substantiated by open source information. Again, the prosecutor found that the information available did not provide a reasonable basis to believe that the crimes in question would have been committed as part of a widespread and systematic attack against any civilian population.

There were no specific allegations of war crimes having been committed. In any event, based on the available information concerning events in Venezuela since 1 July 2002, the situation was found not to meet the threshold of an armed conflict. There was therefore no reasonable basis to believe that war crimes within the jurisdiction of the ICC have been committed.

Finally, there were no allegations concerning genocide, and the available information was found not to provide a reasonable basis to believe that the crime of genocide had been committed. The prosecutor concluded that the statutory requirements to seek authorisation to initiate an investigation into the situation in Venezuela had not been satisfied. As stated in the response, the OTP's

conclusion could be reconsidered in the light of new facts or evidence, and it remained open to the information providers to submit any such information.

The allegations regarding crimes committed in Iraq related to the launching of military operations and the resulting fatalities by US and allied forces. The prosecutor's response to the allegations outlined the process of receiving and analysing information employed by the OTP. The response noted that the events in question occurred on the territory of Iraq, which was not a state party and which had not lodged a declaration of acceptance of jurisdiction under article 12(3). In addition, crimes committed on the territory of a non-state party only fell within the jurisdiction of the ICC when the perpetrators were state party nationals.

A number of submissions concerned the legality of the war in Iraq in relation to which the prosecutor advised that the ICC cannot exercise jurisdiction over the crime of aggression, and that under the Rome Statute the court has a mandate to examine conduct during the conflict and not the legality of the decision to engage in armed conflict.

Few factual allegations were submitted concerning genocide and crimes against humanity. The OTP was of the view that the available information provided no reasonable indications that coalition forces had 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such', as required in the definition of genocide.<sup>68</sup> Similarly, the available information provided no reasonable indications of the required elements for a crime against humanity, namely, a widespread or systematic attack directed against any civilian population.<sup>69</sup>

The OTP examined allegations relating to the targeting of civilians and to excessive attacks (namely, where the civilian damage or injury was excessive in relation to the anticipated military advantage), and found no reasonable basis to conclude that either crime had been committed.

With respect to allegations concerning the willful killing or inhuman treatment of civilians by state party nationals, the prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the court had been committed. The information available indicated that there were an estimated four to 12 victims of willful killing and a limited number of victims of inhuman treatment, totalling less than 20 persons. The prosecutor's decision on these crimes was that they did not meet the criteria set out in article 8(1) or the general threshold of gravity. That is because, as required under article

8(1), the ICC has jurisdiction over war crimes, ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.

In addition, although the prosecutor found that it was unnecessary, in light of this conclusion, to reach a decision on complementarity, the response notes that the OTP also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.

The OTP expressly compared the particular crimes in Iraq with the scale of the killings in the DRC, Uganda and Darfur situations, a comparison used to highlight that the ICC is a court which gives priority to the most serious crimes committed – whether in Africa or elsewhere. In the prosecutor’s words:

The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.<sup>70</sup>

## Assessing the gravity of the situation and judicial oversight

We have already seen how the state referral mechanism has caused the ICC, through African invitation, to exercise jurisdiction over the situations in Uganda, the DRC and CAR (all states parties) and in future Côte d’Ivoire (to date not a state party).<sup>71</sup> Crucially, the prosecutor also has the power to open an investigation on his or her own initiative on the basis of information indicating the commission of crimes within the court’s jurisdiction. Contrary to the expectations of those critics who fear a court with unprincipled ‘universal’ aspirations,<sup>72</sup> the prosecutor has been slow to exercise this power to initiate an

investigation. It is only recently in respect of the post-election violence in Kenya that the prosecutor decided to use that power, and then only after months of waiting and watching to see whether the Kenyan authorities would investigate the offences themselves.

But whether it is a state party referral (or a *proprio motu* investigation by the prosecutor), even where all the jurisdictional requirements have been met, the case in question must meet an additional threshold of gravity before the prosecutor can intervene. This criterion is most clearly expressed in article 17(1)(d) of the Rome Statute.<sup>73</sup> As the Iraq and Venezuela requests indicate, in determining whether a case is grave enough to justify further action by the court, the OTP will take into account a range of factors, including the nature of the crimes, the scale and manner of their commission, as well as their impact.<sup>74</sup>

A proper appreciation of the gravity criterion in the Rome Statute requires one to acknowledge the inherent differences between domestic and international prosecutions, and to simultaneously appreciate the immense challenges facing the prosecutor. Louis Arbour, who was then the prosecutor of the International Criminal Tribunal for the former Yugoslavia, noted in a statement to the December 1997 session of the Preparatory Committee on the Establishment of an International Criminal Court that there is a major difference between international and domestic prosecution. In a domestic context, there is an assumption that all crimes that go beyond the trivial or *de minimis* range are to be prosecuted. But, before an international tribunal,

The discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.<sup>75</sup>

Philippe Kirsch and Darryl Robinson provide further elaboration. They point out:

Since the issue of trigger mechanisms relates to the special problems of activating an international criminal justice mechanism, it is hardly surprising that there could be no relevant legal precedents in national

procedural laws. ... The ICC, however, presented a novel problem as it represented the first permanent international criminal law institution empowered to deal with future and unknown situations. Thus, it was necessary to determine the procedural mechanisms to 'trigger' ICC proceedings over future situations that may arise.<sup>76</sup>

One of the ways in which the drafters of the Rome Statute purported to assist the ICC prosecutor to choose from many complaints the appropriate ones for international intervention by the ICC was by means of the gravity criterion. That the prosecutor requires this trigger mechanism is made clear by the breadth and depth of complaints that the OTP has received. In its first three years of operation alone, the OTP received nearly 2 000 communications from individuals or groups in more than 100 countries. One can thus appreciate the manifest difference between the OTP's decisions on investigation and prosecution from those that a domestic prosecutor might have to make, the place for the gravity criterion within the Rome Statute, and the concomitant constraints placed on the prosecutor.

The prosecutor has said that, in determining whether to exercise his powers, he is required to consider three factors, all of them rooted in the provisions of the Rome Statute. First, he must determine whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed.<sup>77</sup> Second, he must assess whether the case would be admissible in accordance with article 17 of the statute: this necessitates examining the familiar standard of whether the national courts are unwilling or unable genuinely to proceed. But it also involves assessing what Bill Schabas has described as 'the rather enigmatic notion of "gravity"'.<sup>78</sup> If these conditions are met, then the third requirement must be considered: whether it is in the 'interests of justice' for the matter to be investigated.<sup>79</sup> As the prosecutor himself has explained:

While, in a general sense, any crime within the jurisdiction of the Court is 'grave', the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied. This assessment is necessary as the Court is faced with multiple situations involving hundreds of thousands of crimes and must select situations in accordance with the Article 53 criteria.<sup>80</sup>

Furthermore, the prosecutor's decisions are subject to oversight by judges of the court.<sup>81</sup> That is to say that much of the prosecutor's so-called independence is in fact significantly constrained. While the prosecutor is not required to obtain authorisation to initiate an investigation when a state party or the Security Council refer a situation to the ICC, he is still required at a preliminary stage to decide whether there is a 'reasonable basis' to proceed".<sup>82</sup>

There is increased oversight over decisions to decline an investigation. For instance, when the prosecutor declines to investigate a case he or she shall inform the pre-trial chamber (and the relevant state in cases of state referrals and the Security Council in cases of a Security Council referral) of his or her conclusion and the reasons for the conclusion.<sup>83</sup> In response, the state concerned or the Security Council may demand that the pre-trial chamber review a decision of the prosecutor not to proceed and may request the prosecutor to reconsider that decision.<sup>84</sup>

So too, when the prosecutor, taking into account the gravity of the crime and the interests of victims, nonetheless declines to initiate an investigation because he or she has substantial reasons to believe that an investigation would not serve the interests of justice,<sup>85</sup> the prosecutor must inform the ICC pre-trial chamber accordingly. The pre-trial chamber may, on its own initiative, review this decision, in which event it becomes final only when confirmed by the chamber.<sup>86</sup>

## **The ICC's assumption of jurisdiction: not lightly, and on behalf of African states**

While it is a geographic fact that the court's first cases involve situations on the African continent, we can see that it is simplistic to argue that the ICC is therefore 'unfairly' targeting Africa. As the short synopsis of each situation has already indicated, the majority of cases before the ICC are there because the state in question self-referred the situation to the court in terms of the Rome Statute. Reportedly, the prosecutor has received self-referrals only from African countries.<sup>87</sup> Furthermore, the prosecutor's decision to investigate each of these situations has been taken within the constraints laid down by the Rome Statute, including such factors as the gravity criterion and whether a reasonable basis exists for the prosecution of the perpetrators.

As will already be clear from the brief discussion of the various referrals and requests for investigation directed at the OTP, the Rome Statute strictly defines the ICC's jurisdiction. The subject-matter jurisdiction of the court is limited to investigations of the most serious crimes of concern to the international community, and the temporal jurisdiction of the court is limited to crimes occurring after the entry into force of the Statute, namely 1 July 2002.<sup>88</sup> For those states that become party to the statute after 1 July 2001, the ICC has jurisdiction only over crimes committed after the entry into force of the statute with respect to that state.<sup>89</sup>

In addition to these subject-matter and temporal restrictions, the Rome Statute further restricts the jurisdiction of the court to the most clearly established bases of jurisdiction known in criminal law: the territorial principle and the active national principle. Absent a referral from the Security Council, the ICC may act only where its jurisdiction has been accepted by the state on whose territory the crime occurred, or the state of nationality of the alleged perpetrators.

All states that become parties to the Rome Statute thereby accept the jurisdiction of the court with respect to these crimes. That is a consequence of ratification. In order to become a party to a multilateral treaty, a state must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A state may express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. One of the most common ways is ratification.

A state that has ratified the Rome Statute may refer a situation to the prosecutor where any of these crimes appears to have been committed if the alleged perpetrator is a national of a state party or if the crime in question was committed on the territory of a state party or a state that has made a declaration accepting the jurisdiction of the court. Thus, article 12 of the Rome Statute provides that the court may exercise jurisdiction if: a) the state where the alleged crime was committed is a party to the statute (*territoriality*); or, b) the state of which the accused is a national is a party to the statute (*nationality*).

The Uganda, DRC and Central African Republic referrals demonstrate how in terms of article 14 of the statute any state party may refer to the ICC a 'situation' in which one or more crimes within the jurisdiction of the court appear to have been committed, so long as the preconditions to the court's

exercise of jurisdiction have been met, namely, that the alleged perpetrators of the crimes are nationals of a state party or the crimes are committed on the territory of a state party.<sup>90</sup> As an illustration, it is just as well to recall the announcement by the court after it received the first of its three African requests for investigation, from the DRC:

The Prosecutor of the International Criminal Court, Luis Moreno Ocampo, has received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. By means of this letter, the DRC asked the Prosecutor to investigate in order to determine if one or more persons should be charged with such crimes, and the authorities committed to cooperate with the International Criminal Court.<sup>91</sup>

The referrals – particularly by Uganda and the DRC – demonstrate how there have been attempts by African states to use the ICC for political ends. It is no secret that the Ugandan and the DRC governments had their own reasons for inviting the ICC to do business in their respective countries. These appear to have been to employ the court to prosecute rebel bands within their own territories.<sup>92</sup> While there has been criticism directed at the ICC prosecutor for too tamely complying with these self-referrals in order to ensure cases before the court, there is a double irony in suggesting that these African situations are evidence of the ICC's meddling in Africa.<sup>93</sup>

It is thus difficult to take seriously suggestions that the DRC, Uganda and CAR referrals stand as proof that the ICC is unhealthily preoccupied with Africa. It is not that the ICC is transmuting into a Western court with some colonial affection for punishment of Africans guilty of crimes against humanity. Assertions about the court's apparently over developed appetite for African atrocities, or intimations of US-behind-the-scenes machinations in the court's choice of African investigations, are complaints that do not match the facts or the processes adopted by the OTP.

A reflection on the OTP's screening process and the self-referrals by Uganda, DRC and the CAR suggest rather that Africa is in the court's sights because African states parties – with serious consideration, one may fairly

assume, of their rights and responsibilities as states parties to the Rome Statute, and/or because of their own strategic objectives – have chosen that outcome, and the court has accepted that there is a reasonable basis for initiating an investigation.

The invitations made by the independent governments of Uganda, DRC and CAR to the ICC to investigate situations in their respective states, are invitations made by states parties to the Rome Statute. This is not insignificant. By ratifying the statute these three states showed their acceptance (morally, and legally under international law) of the Rome Statute's ideals.

Those ideals are captured in the statute's preamble, which records, *inter alia*, a recognition by states parties that 'grave crimes threaten the peace, security and well-being of the world'; an affirmation 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'; a determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes', and 'to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole'.

By becoming states parties then, the DRC, Uganda and CAR 'resolved', along with all other states that chose or choose to become members of the Rome Statute, 'to guarantee lasting respect for the enforcement of international justice'. Putting to one side the political mileage that these governments might have assumed was to be gained by self-referring a situation to the ICC, a plausible interpretation which deserves encouragement is that their actions also show respect for the principles of international criminal justice through a request to the ICC for assistance in acting against those members of rebel groups who are most responsible for international crimes.

Suggestions that these three states are unwitting pawns in some neo-colonial project are not only patronising, they also devalue the international rule of law. It is worth noting the generic problems with treaty implementation, ones that have been encountered in many countries in terms of following up the ratification of human rights instruments, for example. An African example relates to the African Charter on Human and Peoples' Rights. Parties are

obliged to recognise the rights, duties and freedoms enshrined in this charter and should undertake to adopt legislative or other measures to give effect to them.<sup>94</sup> The charter was drafted and acceded to voluntarily by African states wishing to ensure the respect of human rights on this continent. Once ratified, states parties to the charter are legally bound to its provisions. As the African Commission has noted, a state not wishing to abide by the charter might have refrained from ratification.<sup>95</sup>

It is not necessary to explore the literature on this issue, except to note that the Rome Statute is not the only instrument of great aspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon.

What is remarkable about the Uganda, DRC, and CAR referrals is that they buck this trend. By choosing to self-refer under the Rome Statute each of the states parties demonstrated their commitment to utilise the Rome Statute and the principles agreed on at Rome by African and other states. Sadly, critics who denounce the ICC's involvement in these states as anti-African not only miss the point, they also unwittingly contribute to what is rightly regarded as an African malaise: the failure to take seriously treaty commitments voluntarily assumed by states.

## Complementarity as a further limiting factor

The Rome Statute of the ICC has its flaws – the nature of the drafting process and the political issues at stake ensured that – but African states along with their counterparts at Rome concluded a treaty in which the principle of individual criminal liability is established for those responsible for the most serious human rights violations, and whereby an institution has been established, on a permanent basis, to ensure the punishment of such individuals. This punishment does not follow after the court's exercise of universal jurisdiction – as though it was an international manifestation of the French or Spanish domestic calls for action against Kagame. Investigation and punishment takes place within a carefully crafted system of complementarity between domestic actors and the ICC. Indeed, complementarity is arguably the key feature of the ICC regime. It is thus important to appreciate its significance, and in so doing, to appreciate how hollow are the fears of those who believe that the court wields

excessive and far-reaching powers of investigation (and hence interference in state sovereignty).

Proposals that the principle of universal jurisdiction should apply in respect of state referrals were rejected at the Rome Conference. The preamble to the Rome Statute says that the court's jurisdiction will be complementary to that of national jurisdiction, and article 17 of the statute embodies the complementarity principle. At the heart of the complementarity principle is the ability to prosecute international criminals in one's national courts, on behalf of the international community, or to have in place mechanisms to arrest and surrender to the ICC persons that the ICC seeks to prosecute and who happen to be in one's jurisdiction.

The general nature of national implementation obligations assumed by states which elect to become party to the Rome Statute are wide ranging.<sup>96</sup> The Rome Statute indicates that effective prosecution is that which is ensured by taking measures at the national level and by international cooperation. Because of its special nature, states party to the Rome Statute are expected to assume a level of responsibility and capability the realisation of which will entail taking a number of important legal and practical measures.

Aside from enabling its own justice officials to prosecute international crimes before its domestic courts, a state party is furthermore obliged to cooperate with the ICC in relation to an investigation and/or prosecution which the court might be seized with. The prosecution of a matter before the ICC (and the process leading to the decision to prosecute) will normally require very considerable investigation, information gathering, and inter-agency cooperation, often with high levels of confidentiality and information or witness protection required.

Contact between the ICC (in particular OTP) and the national authorities will likely become extensive during the course of an investigation and any request for arrest and surrender or any prosecution. Indeed in many cases there is likely to be a fairly complex and substantial process of information gathering, analysis and consideration that must be undertaken before the decision to formally investigate can even be taken. The ICC lacks many of the institutional features necessary for a comprehensive handling of a criminal matter: for ordinary policing and other functions, it will rely heavily on the assistance and cooperation of states' national mechanisms, procedures and agencies.

In order to be able to cooperate with the OTP during the investigation or prosecution period<sup>97</sup> (or otherwise with the pre-trial chamber or the ICC once a

matter is properly before these, for example in relation to witnesses), a state party is obliged to have a range of powers, facilities and procedures in place, including by promulgation of laws and regulations. The legal framework for requests for arrest and surrender (on the one hand) and all other forms of cooperation (on the other) is mostly set out in part 9 of the Rome Statute. Article 86 describes the general duty on states to cooperate fully with the ICC in the investigation and prosecution of crimes. Article 87 sets out general provisions for requests for cooperation, giving the ICC authority (under article 87(1)(a)) to make requests of the state for cooperation. Failure to cooperate can, amongst other things, lead to a referral of the state to the Security Council (article 87(7)).

Article 88 is a significant provision, obliging states to ensure that there are in place nationally the procedures and powers to enable all forms of cooperation contemplated in the statute. Unlike inter-state legal assistance and cooperation, the Rome Statute makes clear that by ratifying states accept that there are no grounds for refusing ICC requests for arrest and surrender.<sup>98</sup> States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to follow up arrest warrants or summons issued by the ICC, and to surrender persons in due course.

While the Rome Statute envisages a duty to cooperate with the court in relation to investigation and prosecution, it should be remembered that the principle of complementarity is premised on the expectation that domestic states that are willing and able should be prosecuting these crimes themselves. The principle of ‘complementarity’ ensures that the ICC operates as a buttress in support of the criminal justice systems of states parties at a national level, and as part of a broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. It is only if a state party is ‘unwilling or unable’ to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is then seized with jurisdiction.<sup>99</sup>

To enforce this principle of complementarity and to further limit the ICC’s propensity for interference with sovereignty, article 18 of the Rome Statute requires that the prosecutor must notify all states parties and states with jurisdiction over a particular case – in other words non states parties – before beginning an investigation by the court,<sup>100</sup> and cannot begin an investigation on his own initiative without first receiving the approval of a chamber of three judges.<sup>101</sup> At this stage of the proceedings, it is open to both states parties

and non-states parties to insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation.<sup>102</sup> If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the ICC may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.<sup>103</sup> The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

Complementarity is therefore an essential component of the court's structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically. The ICC is one component of a regime – a network of states that have undertaken to do the ICC's work for it; to act, if you will, as domestic international criminal courts in respect of ICC crimes. Because of the ICC's system of complementarity we can therefore expect national criminal justice systems to play the important role of doing the ICC's work by providing exemplary punishments which will serve to restore the international legal order. In this respect, Anne-Marie Slaughter, has pointed out that:

One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy.<sup>104</sup>

This is the promise of international criminal justice as exemplified in the ICC's complementarity regime. One way in which we will come to regard the ICC as effective – as having achieved its promise – will be when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian and human rights law to investigate and prosecute international crimes as defined by the ICC. In this respect the prosecutor has himself stressed the importance of what is called 'positive complementarity'. Paragraph 6 of the preamble to the Rome Statute declares that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. The prosecutor has often invoked this principle. The September 2006 Prosecutorial Strategy states:

With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.<sup>105</sup>

The very principle of complementarity makes it clear that by domestic prosecutors acting against international criminals, domestic courts ensure the international rule of law through a mutually reinforcing (or complementary) international system of justice.<sup>106</sup> As Antonio Cassese points out, there was a practical basis at Rome for this principle:

It is healthy, it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case (territoriality, nationality) or even on universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused.<sup>107</sup>

Thus, and by a return to the Iraq example, with respect to the charges that British troops had committed war crimes in Iraq, the ICC prosecutor found that the complaint failed to satisfy the gravity threshold set out in the Rome Statute. He added: 'It may be observed, however, that the Office also collected information on national proceedings [in the UK], including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents'.<sup>108</sup> While the prosecutor would in any event have declined to prosecute these crimes on the basis of the gravity criterion not

being satisfied, it is noteworthy that UK courts exercised domestic prosecutions in respect of those alleged to have been guilty of international crimes in Iraq.

It rather seems that instead of the ICC being an instrument of global or universal (in)justice disrespectful of particularly African and Arab states' sovereignty, the very premise of complementarity ensures appropriate respect for states by demanding that the ICC defers to their competence and right to investigate international crimes. The choice that complementarity offers and symbolises has apparently been ignored by the court's African critics. As Slaughter expresses, the choice is for a nation to try its own or they will be tried in The Hague. Instead of weakening states and undermining sovereignty, properly understood the ICC regime 'strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle'.<sup>109</sup>

## Conclusion and lessons

The complaint about the ICC's affection for African cases is accordingly a complaint that appears to be overblown. It is worth concluding on this point by noting that the South African government's legal opinion (appended after the media briefing given by Ntsaluba on 31 July 2009) indicates that the government is aware that the true facts are that the court is seized with African cases because of African state referrals and in the interests of African victims.

While the opinion records that '[t]here has been an outcry by some analysts and leaders from the Continent that the ICC seem (sic) to be focusing only on Africa, as the four cases currently before the Court are African cases' it continues that '[i]t should be noted that while this argument is true, three of the four cases were self-referral (sic), only the Sudan case was referred to (sic) by the UNSC'. The opinion further notes (without necessary approval) that '[s]ome analysts argue that the focus on Africa should be celebrated rather than criticised as the ICC was created in order for the perpetrators of worst atrocities, regardless of rank and status, would be brought to account (sic)'.

Indeed, that point has been made by amongst others Desmond Tutu and Kofi Annan, two of Africa's most highly respected sons.<sup>110</sup> And when one considers that African states make up the largest regional bloc of nations that have ratified the Rome Statute then statistically it is acceptable (if not probable) that more cases will come from the African continent.

As we have seen, to the four cases already before the court a further African case can now be added in respect of Kenya.<sup>111</sup> The violence that followed Kenya's flawed 2007 general election left over 1 000 people dead, caused around 400 000 to flee their homes, and brought Kenya to the brink of civil war. Leaders of both parties agreed to set up the Commission to Investigate the Post-election Violence (the Waki commission, after its chairman, Justice Philip Waki). An independent review committee was also established to look at the flaws in the election (headed by retired South African constitutional court judge, Johan Kriegler), and a truth, justice, and reconciliation commission to help heal historical grievances dating from well before the 2007 general elections.

The Waki commission recommended wide-ranging reforms of the police as well as the creation of a special tribunal for Kenya, independent of the judiciary, anchored in a constitutional amendment and staffed by both Kenyan and international judges and prosecutors. In the event no special tribunal was established, the Waki commission recommended that former UN Secretary-General Kofi Annan – who had chaired the negotiations that led to the current coalition government – hand over a sealed envelope containing the names of suspects to the ICC. Annan handed over the envelope and other materials from the Waki commission to the ICC prosecutor in July 2009. After months of inaction by Kenya's authorities on national prosecutions for those responsible for the election violence, the prosecutor sought permission, in November 2009, from a pre-trial chamber of three ICC judges to proceed with an investigation.<sup>112</sup> The Kenyan investigation is the first investigation by the court following the prosecutor's use of his *proprio motu* powers under article 15 of the Rome Statute. The prosecutor's request was approved on 31 March 2010 in a majority decision of the court.<sup>113</sup> In a press conference thereafter, the prosecutor reminded Kenyans that he was pursuing justice for *them*, and that 'this Court is their Court'.<sup>114</sup>

There is however no doubt that the court's African focus has created a perception problem. The perception problem is exacerbated by the widely held view that the ICC has itself done too little by way of outreach and education in pursuing its work on the continent.<sup>115</sup> This perception problem has been seized upon by the court's detractors, and it is an unnecessary distraction for the ICC.

It is thus important to highlight that the prosecutor of the ICC has indicated that his office is conducting analysis of several situations outside Africa – Colombia and Georgia amongst others have been or are under analysis, and the

OTP is considering whether it has jurisdiction to act in respect of a complaint by the Palestinian Authority arising from alleged crimes committed by Israel in Gaza during Operation Cast Lead (December 2008 to January 2009).

## Recommendations

While Claim 1 (that is, that the ICC is a ‘Western’ court unfairly focused on Africa) is easily dismissed as overblown and not based on a proper understanding of the ICC and its statute, it cannot be gainsaid that the court’s African focus has created a perception problem. To avoid this perception problem, and under the principle of complementarity built into the Rome Statute to enhance domestic investigation and prosecution of international crime in Africa, the following five recommendations are made.

- 1) AU member states should reiterate their commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with the Constitutive Act of the Union. This commitment encompasses the fight against the crime of genocide, war crimes and crimes against humanity as recorded in article 4(h) of the Constitutive Act and in other legal instruments of the AU.
- 2) To close the perception gap African states should be encouraged to assist the ICC in its outreach work and to take measures to facilitate greater cooperation between the AU and the ICC through the establishment of an ICC-Africa liaison office in Addis Ababa. At the same time African states should be encouraged to enter into a meaningful cooperation agreement between the AU and the ICC. And the AU Commission should furthermore be encouraged to extend an invitation to the ICC to sessions of the AU Assembly so that there may be greater collaboration and understanding between the AU and ICC and an opportunity for respectful and meaningful discussion around concerns.

- 3) It is vital that African states capacitate themselves to undertake domestic prosecution of international crimes consistent with their complementarity obligations. In this regard it is vital to push for domestic implementation legislation. The drive to ratify the Rome Statute must be backed up by energetic calls for implementation laws to be put in place. The problem too often is that international criminal justice – and the directed obligations of the Rome Statute – may be seen by parliamentarians and justice officials as exotic, external, and ethereal. By domesticating the Rome Statute these obligations are brought home; and the sense of disconnect or at least distance between the goals of international criminal justice and that of the state is removed. In this way it becomes more difficult for governments and their officials to ignore their treaty obligations.

In addition to adopting legislation incorporating the obligations and ideals of the Rome Statute directly into domestic law, specialised capacity among domestic prosecutors and investigators will need to be developed. Particular skills are needed to handle the complexities and political controversies of pursuing cases against individuals accused of the world's worst crimes. South Africa is a case in point, at least on the African continent. It is only because of South Africa's implementation legislation (the ICC Act) that there is now a specialised prosecutorial unit in the form of the Priority Crimes Litigation Unit. Such domestic units are an important future component of international criminal justice – both under the principle of complementarity in terms of the Rome Statute, but also as units that may in appropriate cases exercise universal jurisdiction where empowered to do so.

Finally in this regard, it must be recognised that progressively phrased domestic legislation and specialised prosecutorial and investigatory units are not enough. There must be political will in support of this work. And here lies a vital role for civil society. Perhaps the most vital contribution that may be made by civil society is to vigilantly remind governments and regional bodies (including the AU) that the ICC is not the preserve of states

or powerful political leaders – to be used or ignored as befits political will (or the lack thereof). Rather, that communities and individuals have an important stake in the ICC and its project of international criminal justice and that they are ultimately the most important shareholders of a project aimed at ensuring that impunity does not follow the commission of serious international crimes.

- 4) The prosecutor of the ICC should be encouraged – where the evidence is sufficient – to open investigations of situations in continents other than Africa. That might be done by the use of his *proprio motu* powers under the statute (as has been done in respect of Kenya), and by encouraging state referrals from outside Africa. It is imperative that the ICC be encouraged to exercise its jurisdiction beyond Africa. Africa, and indeed the world, wants and needs a court that is committed to pursuing cases across the globe.
- 5) As a matter of urgency it might be recommended that the prosecutor should positively consider the declaration by the Palestinian Authority to allow the ICC to investigate war crimes and crimes against humanity committed on Palestinian territory during Operation Cast Lead. The Rome Statute allows a state not party to the statute to declare that it accepts the jurisdiction of the ICC for international crimes committed within its territory. Significantly, the Palestine declaration would allow the ICC to exercise jurisdiction over crimes committed by both Palestinians and Israelis on Palestinian territory.

The Rome Statute fails to define a state, and it is now left to the ICC itself to make such a determination. Over 100 states have recognised a ‘state of Palestine’, and it is a member of the Arab League. Moreover, the Palestinian National Authority has diplomatic relations with many states and observer status at the United Nations. It is not necessary for the ICC prosecutor to decide that Palestine is a state for all purposes, but only for

the purpose of the court. In so deciding, the prosecutor should be urged to adopt an expansive approach that gives effect to the main purpose of the ICC.

This final recommendation should be pushed vigorously. A decision by the ICC to investigate whether crimes were committed in Gaza, in the course of Israel's offensive in Operation Cast Lead, would give the court an opportunity to show that it is not infected by a double standard and that it is willing to take action against international crimes committed outside Africa.<sup>116</sup>

It is notable that the 15 September 2009 report by a fact-finding mission organised by the Geneva-based UN Human Rights Council (led by former judge Richard Goldstone of South Africa) called on both sides to thoroughly investigate the allegations of war crimes and crimes against humanity. The probes should be 'independent and in conformity with international standards' and establish a committee of human rights experts to monitor any such proceedings in Israel and the Palestinian territories. If either Israel or the Palestinians fail to do so, then the 15-nation Security Council has been called upon to refer the situation in Gaza to the prosecutor of the ICC.

## **CLAIM 2: THE ICC IS THWARTING AFRICAN EFFORTS TO DEAL WITH ATROCITIES ON THE CONTINENT**

The suggestion that the ICC's work in Africa is undermining rather than assisting African efforts to solve the continent's problems is a complaint vocalised by the AU. In this regard the Sudan referral is an illustrative example. As mentioned earlier, while there have been a variety of criticisms of the court in relation to each of the four situations it is investigating, matters have come to a head in response to the Sudan referral. Of course, indicting a head of state is then often unsettling for other reasons, and includes the fear and uncertainty of an independent third party's involvement in the complex dynamics of peace negotiations and conflict resolution. And this in part appears to be one of the reasons most African states are pushing for the Security Council to defer the prosecution of al-Bashir.<sup>117</sup>

For instance, in its press release following the 3 July 2009 decision in Sirte, the AU explained that its decision: ‘Bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonized approach to justice and peace, neither of which should be pursued at the expense of the other’.<sup>118</sup> Accordingly, continues the press release, the 3 July decision ‘should be received as a very significant pronouncement by the supreme AU decision-making body and a balanced expression of willingness to promote both peace and justice in Darfour (sic) and in The Sudan as a whole’ and ‘[i]t is now incumbent upon the United Nations Security Council to seriously consider the request by the AU for the deferral of the process initiated by the ICC, in accordance with Article 16 of the Rome Statute’.

Earlier the press release stressed the ‘unflinching commitment of AU member states to combating impunity and promoting democracy’, and that the 3 July 2009 decision ‘underlines the need to empower the African Court on Human and Peoples’ Rights to deal with serious crimes of international concern in a manner complementary to national jurisdiction’. The suggestion here appears to be threefold:

- There is a desire in Africa for an ICC process that presents or respects ‘an harmonized approach to justice and peace’.
- Africa wants its calls for a Security Council deferral of the Sudan investigation to be taken seriously, indeed acceded to.
- Hopes have been placed in an empowered African court to deal with international crimes as a plausible alternative to the ICC (and an alternative that might apparently deprive the ICC of its jurisdiction at least in respect of African situations).

Each of these suggestions ultimately arises from a preference expressed by the AU for African solutions to African problems, and in particular for African peace efforts on the continent not to be undermined by the ICC. It is accordingly necessary to focus in some detail on the call by the AU for the ICC and/or the Security Council to give peace a chance.

## Peace and justice before the ICC: a presumption in favour of justice

The debate about peace and justice and how the two are to be reconciled is an old one and beyond the scope of this monograph. However, certain points are worth stressing in relation to that debate insofar as it engages the ICC.

In the first place, it may be noted that the ICC's involvement in Sudan (or indeed other parts of Africa) is consistent with an expressed agreement in a variety of African documents that international crimes should not be met with impunity. No less than the AU's Constitutive Act (article 4(h)) stresses this principle. And the African Commission on Human and Peoples' Rights (the precursor to the African Court on Human and Peoples' Rights) has affirmed this commitment as an African ideal. It may be said that on paper at least, the AU's Constitutive Act expresses a presumption in favour of prosecution for international crimes.

Second, striving for justice in respect of these crimes is a principle that is supported by widespread state practice on the African continent. In order to become a party to a multilateral treaty, a state must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A state may express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. The most common way is through ratification. It is not insignificant that more than half of Africa's states (and the largest regional grouping in the world) have ratified the Rome Statute, thereby unequivocally expressing that they consider themselves legally committed to the principle that there ought ordinarily to be prosecutions in circumstances where serious crimes of concern to the international community have been committed.

For countries that have domesticated the Rome Statute, this commitment to a justice response in relation to international crimes goes beyond treaty ratification and is domestically reflected national law.

### South Africa's ICC Act favours the prosecution of international crimes

In the case of South Africa, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 provides that there is an obligation to investigate and prosecute. The preamble speaks of South Africa's commitment to: 'Bringing persons who commit such

atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute.’

The first object of the Act recorded in section 3(a) is to create a framework to ensure that the Rome Statute is effectively implemented in South Africa. The second object of the Act recorded in section 3(b), is to ensure that anything done in terms of the ICC Act, conforms with South Africa’s obligations under the Rome Statute, including its obligation to cooperate internationally with the ICC and to prosecute domestically the perpetrators of crimes against humanity. Another object of the Act recorded in s 3(d), is to enable the National Prosecuting Authority to prosecute and the high courts to adjudicate in cases against people accused of having committed crimes against humanity, both inside South Africa and beyond its borders.

Once a person suspected of international crimes has been arrested, the National Director of Public Prosecutions is obliged in terms of section 5(3), when he considers whether to institute such a prosecution, to: ‘give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime’.

Read as a whole there can be no doubt that in terms of the Act, parliament favours the prosecution of international crimes, either by cooperating with the ICC in relation to suspects the court is investigating, or if needs be by domestic prosecution in South Africa.

On the topic of state practice it might also be recalled that the situation in Sudan was considered serious enough for the Security Council to invoke its chapter VII powers to refer the atrocities to the ICC for its attention. That decision by the council was taken – in the first place – without a veto being exercised by any of the five permanent members, and with the support of African states who recognised the gravity of the crimes that were being committed and the need for a justice response. In the second place, it must be recalled that before the referral the Security Council had adopted resolution 1564 which charged the secretary-general with establishing a commission of inquiry ‘to investigate reports of violations of international humanitarian law and human rights law

in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable’.

The Darfur Commission, under the leadership of Antonio Cassese, presented its report to the Security Council in February 2005,<sup>119</sup> and recommended that due to the grave crimes that had been committed in Darfur the council invoke its chapter VII powers to refer the matter to the ICC. It should be recalled that the commission included highly respected African and Arab members. The African members were Therese Striggner-Scott (a barrister and principal partner with a legal consulting firm in Accra, Ghana, and who served as judge of the high courts of Ghana and Zimbabwe, and was the executive chairperson of the Ghana Law Reform Commission from January 2000 to February 2004), and Dumisa Ntsebeza (a former commissioner on the Truth and Reconciliation Commission in South Africa, and who served as acting judge on the high court of South Africa, as well as the South African labour court). The Arab member was Mohammed Fayek (then secretary-general of the Arab Organisation for Human Rights, and who previously served in Egypt as minister of information, minister of state for foreign affairs, minister of national guidance, and chef de cabinet and advisor to the president for African and Asian Affairs).

There is accordingly an understanding by African states that at the very least true and lasting peace requires a commitment to justice. The two imperatives may – and probably ought to – operate side by side.

The discussion above demonstrates that African states parties to the ICC have already expressed their preference for a justice response to international crimes: that is, states parties ratified the Rome Statute because of the importance they attach to the view that there should be no impunity for international crimes; and by becoming a party to the statute they have accepted legal duties in respect of the prosecution of persons responsible for these crimes.

Naturally, that is not to say that prosecutions must be pursued at all costs or without regard to other considerations such as timing or the progress of a particular peace process. The Rome Statute itself recognises that the pursuit of prosecutions is not an absolute or blind commitment. But at the very least the principle in favour of prosecution – voluntarily assumed as a duty to prosecute by states parties to the Rome Statute – should be acknowledged within Africa. And that presumption *in favour* of prosecution demands that any arguments for investigations/prosecutions to be deferred be made convincingly and backed

up with demonstrable evidence. Most importantly, as discussed immediately below, the arguments should be made in good faith within – rather than outside – the international criminal justice system created under the Rome Statute.

## **Giving peace a chance: the legal duty on African states parties to make a case for deferral**

It has been said above that although the ICC's international criminal justice model seeks to ensure justice for perpetrators of crimes against humanity, war crimes and genocide, there is no irrebuttable presumption in favour of prosecutions under the Rome Statute. At the same time, a deferral of prosecutions is not there simply for the asking. States parties under the Rome Statute have a duty to make out a convincing case for a deferral, whether that request is made by those states individually or collectively as part of a larger regional grouping such as in the AU. And at the very least states parties have a good faith obligation as members of the Rome Statute to make their claims for deferral with proper consideration for the publicly available evidence, and then through the recognised procedures built into the statute.

### *Weigh the evidence in favour of prosecution and deferral*

Considering the publicly available evidence first, the following might be noted. The Security Council on 31 March 2005 referred the atrocities committed in Darfur to the ICC for investigation. The council had also previously adopted resolution 1564 which charged the secretary-general with establishing a commission of inquiry into the atrocities committed in Darfur. The Darfur Commission presented its report to the Security Council in February 2005.<sup>120</sup>

The commission fulfilled its mandate by visiting Sudan on two occasions. The commission found that the various reported attacks by the government and the *janjaweed* on civilians constituted 'large-scale war crimes' and that the mass killing of civilians by the government and the *janjaweed* were both widespread and systematic, and, as such, were 'likely to amount to a crime against humanity'.<sup>121</sup> With regard to the rebels, the commission found that although they were also responsible for attacks on civilians, there was no evidence to suggest that these attacks were widespread or systematic. Therefore, while the killing of a civilian by the rebels would amount to a very serious war crime, the commission did not conclude that these constituted crimes against

humanity.<sup>122</sup> Given the horrific sexual violence committed against women and children in Darfur, it was important that the commission found that ‘rape or other forms of sexual violence committed by the *janjaweed* and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity’, as would the crime of sexual slavery.<sup>123</sup>

It is also of significance that the commission found that as far as mechanisms for ensuring accountability for the atrocities committed in Sudan are concerned, the ‘Sudanese courts are unable and unwilling to prosecute and try the alleged offenders... Other mechanisms are needed to do justice’.<sup>124</sup> This is no small finding. As discussed below, the complementarity principle built into the ICC statute might be relied on by the Sudanese government (even as a non-party state) to argue that it is willing and able to prosecute the offenders. Should it in fact be willing and able, then the ICC would have to acquiesce in the prosecution of offenders so as to allow the Sudanese authorities to do the job.

After the matter had been referred to the ICC by the Security Council, and after analysing the information available, the prosecutor determined that there was a reasonable basis to proceed with an investigation, which was duly initiated in June 2005. In his periodic reports to the Security Council, the prosecutor has stated that the evidence available shows a widespread pattern of serious crimes, including murder, rape, the displacement of civilians and the looting and burning of civilian property.<sup>125</sup>

In respect of the Darfur situation, the ICC judges are currently dealing with cases against four individuals accused of international crimes. One suspect, Bahr Idriss Abu Garda presented himself voluntarily before Pre-trial Chamber I of the ICC on 18 May 2009.<sup>126</sup> His appearance followed a summons to appear issued by the chamber after the prosecutor had filed an application for the issuance of a warrant of arrest or summons to appear alleging that Abu Garda was involved in the commission of ICC crimes during an attack on the AU mission in Sudan on 29 September 2007. The allegation is that during that attack 12 peacekeepers were killed by rebel forces under Abu Garda’s control and command. After a confirmation hearing was conducted in October 2009, the pre-trial chamber held that there are no reasonable grounds to believe that Abu Garda has committed war crimes and declined to confirm the charges against him (the decision does not preclude the OTP from subsequently requesting the

confirmation of the charges against Abu Garda if such request is supported by additional evidence).<sup>127</sup>

Prior to Abu Garba's matter, in February 2007, the prosecutor requested the ICC pre-trial chamber to issue summons to appear or, alternatively, warrants of arrest in respect of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb). Ahmad Harun is the former minister of state for the interior and the current minister of state for humanitarian affairs while Ali Kushayb is a militia leader known to have been operating in Darfur at the relevant time.<sup>128</sup> The charges against Harun and Kushayb relate to war crimes and crimes against humanity. In April 2007, the court issued warrants of arrest for these individuals and requests for their arrest and surrender have since been transmitted to the government of Sudan. It is not insignificant that at the time of writing, neither suspect has been surrendered to the court.<sup>129</sup>

Then, in early July 2008 the prosecutor decided to seek an arrest warrant against President Omar al-Bashir for genocide, crimes against humanity and war crimes in Darfur. That warrant also had to be confirmed by the pre-trial chamber before it could be issued. The chamber duly did so and its decision is publicly available. Importantly, while the pre-trial chamber accepted that there was a reasonable basis for believing that al-Bashir might be responsible for war crimes and crimes against humanity, the judges rejected the prosecutor's charges of genocide, stating that there was insufficient evidence to proceed against al-Bashir in respect of that crime.<sup>130</sup> The pre-trial chamber's findings in respect of genocide – in particular its onerous standard of proof for inferring genocide – have however been reversed on appeal. The appeals chamber on 3 February 2010 ordered the pre-trial chamber to reconsider the genocide charges and on 12 July 2010 these were confirmed.<sup>131</sup> The following facts are thus beyond dispute:

- Grave crimes have been committed in Sudan and continue to this day.
- An independent body of experts (including a number of African and Arab individuals) has concluded that Sudan is not willing to act against the perpetrators by prosecuting them for war crimes and/or crimes against humanity.
- To date the Sudanese government has failed to hand over suspects to the ICC for prosecution, and has failed domestically to act against the perpetrators of international crimes.

- The independent judges of the ICC's pre-trial chamber have accepted that there is a reasonable basis in the evidence presented thus far to proceed with an investigation against al-Bashir for genocide, war crimes and crimes against humanity.

It is noteworthy that when the Darfur Commission recommended that the Security Council refer the situation in Darfur to the ICC 'to protect the civilians of Darfur and end the rampant impunity currently prevailing there',<sup>132</sup> the commission endorsed the ICC as the 'only credible way of bringing alleged perpetrators to justice'.<sup>133</sup> That assessment remains true today, given the abject failure by Sudan to act against the perpetrators itself.

It is furthermore important to recall that in advocating the referral of the situation in Darfur by the Security Council, the commission pointed out that the situation in Darfur meets the requirement of chapter VII, in that it constitutes a 'threat to peace and security' as was acknowledged by the Security Council in its resolutions 1556 and 1564. Furthermore, the commission also took note of the Security Council's emphasis in these resolutions of the 'need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region'.<sup>134</sup>

But most importantly, Sudan has had an opening since February 2005 to demonstrate its willingness to act against perpetrators of violence and thereby not only to contribute towards peace, but also to oust the ICC's involvement under the principle of complementarity. It has – to use the words of the AU – had every opportunity to give effect to a 'harmonized approach to justice and peace'.

It is by now well known that the ICC is expected to act in what is described as a 'complementary' relationship with states. The preamble to the Rome Statute says that the court's jurisdiction will be complementary to that of national jurisdiction. The principle is that national courts should be the first to act. It is only if a state is 'unwilling or unable' to investigate and prosecute international crimes committed by its nationals or on its territory that the court is then seized with jurisdiction.<sup>135</sup> To enforce this principle of complementarity, article 18 of the Rome Statute requires that the prosecutor must notify all states parties and states with jurisdiction over a particular case, before beginning an investigation,<sup>136</sup> and cannot begin an investigation on his own initiative without first receiving the approval of a chamber of three judges.<sup>137</sup>

Vitally important in respect of Sudan's conduct is that at this stage of the proceedings, it is open to states to insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation.<sup>138</sup> If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the ICC may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.<sup>139</sup> The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

What about states – like Sudan – that are not party to the Statute? Article 17, which sets out the complementarity regime, provides that the ICC must defer to the investigation or prosecution of a 'State which has jurisdiction over' the case. It does not talk about 'states parties' that have jurisdiction over the case. The reference to a state 'which has jurisdiction' over a case includes non-party states, in that a non-party state may well have jurisdiction over the case on the basis of traditional principles of jurisdiction (territoriality, or nationality). This is also apparent from article 18(1) which provides that all states parties, as well as 'those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned', must be notified by the prosecutor that he intends to initiate an investigation. It is thus clear that Sudan has, since Security Council referral, had the ability to frustrate the ICC's exercise of jurisdiction by insisting that it is willing and able to prosecute the offenders allegedly guilty of war crimes and crimes against humanity in the Darfur region.

The ICC prosecutor, pursuant to the referral and in terms of article 53(1) of the Rome Statute, has gathered and assessed relevant information in order to determine whether there is a reasonable basis to initiate an investigation into the crimes committed in Sudan. Article 53(1) enunciates three considerations that inform his decision regarding whether or not to initiate an investigation. These considerations relate to:

- Whether a crime has been or is being committed within the court's jurisdiction.
- Whether complementarity precludes admissibility.
- Whether or not the interests of justice militate against initiating an investigation.<sup>140</sup>

To assist with this process, the prosecutor received a list of 50 names as well as over 2 500 evidential items from the Darfur Commission.<sup>141</sup> The prosecutor has indicated that he does not consider the list of names binding and may undertake his own investigation to determine which individuals bear the ‘greatest responsibility for the crimes to be prosecuted by the Court’.<sup>142</sup> In undertaking his preliminary analysis, the prosecutor interpreted article 53(1) of the Rome Statute as entailing the consideration of ‘whether there could be cases that would be admissible within the situation in Darfur’.<sup>143</sup> On 1 June 2005, after examining, *inter alia*, the Sudanese justice system and ‘traditional systems for alternative dispute resolution’, and interviewing various interested parties, the prosecutor decided that there were cases that are admissible in terms of article 53(1); which is to say that the prosecutor’s office concluded that the complementarity principle does not stand in the way of a prosecution by the ICC of at least certain cases.

So far the ICC prosecutor has taken a proactive position as far as complementarity is concerned. Ocampo has explained that:

The admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP (Office of the Prosecutor) will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions.<sup>144</sup>

The prosecutor has been clear: ‘In making this assessment the OTP will respect any independent and impartial proceedings that meet the standards required by the Rome Statute’.<sup>145</sup> To date Sudan has provided no evidence that any of its domestic proceedings are worthy of such respect.<sup>146</sup> Accordingly, the deferral of the ICC’s focus on Sudan must be assessed in the following light:

- First, any suggestion that the ICC’s involvement of the ICC should be displaced in favour of domestic prosecutions must take account of the fact that Sudan has to date been both unwilling and unable to prosecute those guilty of war crimes and crimes against humanity. Thus, it cannot plausibly be the case that a deferral will serve the interests of justice, at least insofar as those interests might have been secured by domestic prosecutions in Sudan.

- Second, it must be acknowledged that the Darfur crisis came before the ICC for the right reason. That is because, as the Security Council recognised, the human rights violations involved demanded an international prosecutorial response in the interests of peace and justice. It should only be removed from the ICC for the right reason. In the absence of compelling reasons to show that the peace process in Sudan is a credible one and that the ICC's focus on Darfur will undermine that process, the ICC's involvement remains the only plausible means by which to secure both the interests of peace and justice.
- Third, because it is apparent that Sudan has at least since February 2005 (when the commission presented its report to the Security Council) defiantly failed to take any meaningful steps to combat the impunity that has followed massive and ongoing crimes in Sudan, it has manifestly failed to contribute towards the restoration of security in the region. And it must be questionable what commitment the government has towards peace. Given the Sudanese government's long-standing failure to show a worthy commitment towards security and peace, it is difficult to understand why it should be given the benefit of the doubt through a deferral of the ICC's investigation.

In these circumstances any consideration of calls to suspend the ICC's involvement in Sudan raises the question: deferral to what? There is little evidence of a credible peace process in Sudan and less evidence of Sudan's commitment to ending impunity for international crimes either by cooperating with the ICC or domestically prosecuting offenders. A deferral of the ICC's focus on Sudan would at present be a deferral in favour of very little. That is not to say that the situation might not change in Sudan, or that a good case cannot be made out for peace over justice in other situations on the continent. It is only to say that on the available evidence at this time there appears to be little to upset the Rome Statute's presumption in favour of prosecution in Sudan.

### *Respecting the process in making calls for peace*

Having properly assessed the evidence for and against the ICC's involvement in any given situation, should African states or the AU remain concerned about a prosecution or investigation by the ICC, there are mechanisms internal to the Rome Statute which provide a means for appropriately raising those concerns.

It was pointed out above that the Rome Statute itself envisages that investigations and prosecutions by or before the ICC may in certain

circumstances be deferred. The two situations that are relevant, and which arise in respect of Sudan, flow from article 53 and article 16 of the statute.

Article 53 provides that the prosecutor may decline to initiate an investigation or proceed with a prosecution if that would 'serve the interests of justice'. The question then is what would qualify as a basis for declining to initiate an investigation 'in the interests of justice'. The term 'interests of justice' is not defined in the statute. What is clear is that it is an exceptional basis on which a decision not to investigate may be made. Indeed, the wording of article 53(1)(c) suggests that gravity and the interests of victims would tend to favour prosecution. Consequently, the OTP has indicated that there is a presumption in favour of prosecution where the criteria stipulated in article 53(1)(c) and 53 (2)(c) have been met.<sup>147</sup> The OTP's policy paper on the interests of justice emphasises that the criteria for the exercise of the prosecutor's discretion in relation to this issue 'will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity'.

That being said, it is open to a state or the suspect to argue that the prosecutor should reach such a decision where the individual is participating in a justice process other than a traditional criminal prosecution. So one could imagine the prosecutor declining to prosecute if the suspect was subject to alternative accountability mechanisms (like for example the South African amnesty process which provided some level of accountability or an alternative dispute resolution mechanism like the *gacaca* process in Rwanda).<sup>148</sup> While such an interpretation is certainly plausible, these are still early years before the ICC and without a track record it is not possible to predict with any accuracy whether such an interpretation would be adopted by the prosecutor and approved by the court. Central to this determination would be whether the alternative mechanism adopted by the country provides justice.

Accordingly, the first appropriate process for (African) states to claim that investigations or prosecutions are not in the interests of justice is through invocation of article 53 of the Rome Statute. For instance, the appeal hearings concerning the arrest warrant for al-Bashir are one means by which the concerns might be raised by Sudan, and other African states or even the AU.

The second way in which investigations and prosecutions by or before the ICC may be deferred is through article 16. Under article 16 the Security Council

can use its chapter VII power to stop an investigation or prosecution for a year at a time.

No doubt there are political criticisms that might be leveled at the Security Council being empowered to make such a decision, given its skewed institutional make-up. That concern will be dealt with further below. For now, it is enough to point out that the chapter VII (UN Charter) legal criteria will in any event have to be met. It must be stressed that when the council referred the matter to the ICC, it (on the recommendation of the independent experts in the Darfur Commission) found that the situation in Darfur constituted a threat to international peace and security. The same criteria will be applied by the council in making any deferral decision; that is, there will have to have been a fundamental change in Sudan such that the situation there no longer constitutes a threat to international peace and security, or that continuing the ICC process is a greater threat to peace and security than deferring.<sup>149</sup>

Put differently, in respect of Sudan the question is whether deferral is required because of the Security Council's chapter VII duty to act in the interests of peace and security – in other words whether *not* deferring could be characterised as a threat to the peace or a breach of the peace. There are clearly situations where the decision not to defer to, for instance, a credible domestic peace process might affect international peace.

Thus, the second appropriate process for (African) states to call for deferral of a prosecution is through convincing the Security Council that such a deferral is in the interests of justice and peace.

## Recommendations

Claim 2 (that the ICC is undermining African efforts to solve African problems) is a complex complaint that essentially invokes the peace versus justice debate. While African states are entitled to insist that the ICC be cautious of interfering in conflict situations and of undermining peace processes, certainly the 31 African states parties to the Rome Statute have a treaty duty to:

- Accept that there is ordinarily a presumption in the Rome Statute in favour of prosecution.

- Make calls for deferral of investigations and/or prosecution on the basis of a proper assessment of the publicly available evidence.
- Make calls for deferrals by respecting the internal processes of the Rome Statute to which they are a party.

Until such time as the Rome Statute is amended, it is incumbent upon states parties to the ICC to utilise one of two Rome Statute processes in making any calls for deferral: the first is by claiming under article 53 of the statute that investigations or prosecutions are not in the interests of justice; the second is through convincing the Security Council that such a deferral is in the interests of justice and peace under article 16 of the statute. And it is obviously at a more general level incumbent on these states parties to encourage the AU to respect those processes, given its own commitment in its Constitutive Act to combating impunity for international crimes, and because a majority of the AU's members are treaty members of the Rome Statute. The following recommendations might thus be made:

- 1) African states parties should stress that Sudan has the ability to frustrate the ICC's exercise of jurisdiction by insisting that it is willing and able to prosecute the offenders allegedly guilty of war crimes and crimes against humanity in the Darfur region. Article 17 of the Rome Statute permits Sudan to engage directly with the court. It permits a state that is a subject of proceedings before the ICC to raise an objection to the effect that it is willing and able to prosecute crimes that would otherwise be investigated by the ICC. Only Sudan has standing to make these arguments. Engaging the ICC has its merits: it allows Sudan to make the arguments that it and the AU at its behest have been making in political fora before an institution which really matters, and which has the power (and the duty) to respond.<sup>150</sup> It should be stressed by African states parties that it is up to Sudan to take appropriate domestic measures and to convince the ICC of its ability and willingness to prosecute the international crimes which are in issue. And by corollary, it should be stressed by African states parties that if

Sudan is unable to convince the ICC that it is so enabled, then the ICC remains appropriately seized with the case.

- 2) African states parties and the AU as their regional body should be encouraged to engage critically with the ICC – and with appropriate respect for the provisions of the Rome Statute – regarding deferral claims. For instance, the appeal hearings concerning the arrest warrant for al-Bashir are one means by which the concerns might be raised by Sudan, and other African states or even the AU, with reliance on article 53 of the Rome Statute. In cases where it is considered that prosecutions would be prejudicial to the peace and security of states or the region as a whole, African states should seek to take advantage of the provision of article 16 of the statute. Under that provision, the Security Council may defer an ICC investigation or prosecution for a year. In this regard, African states and the AU should consider continuing to push for a deferral by the Security Council of proceedings initiated against al-Bashir in conformity with previous decisions of the Peace and Security Council and the AU Assembly.

However, such calls should not be made blindly. As states parties to the Rome Statute and with a proper appreciation of the statute's provisions, it will be incumbent on states parties to make out a case for the deferral. In that regard it will be for the states parties to show that it is not in the interests of justice for the ICC to continue with an investigation or a prosecution. And naturally, to make out that case it will be for African states parties to first insist from Sudan that it demonstrates a fundamental change on the ground such that the situation there no longer constitutes a threat to international peace and security, or that continuing the ICC process is a greater threat to peace and security than deferring.

- 3) States parties should insist that the AU call upon Sudan to provide convincing evidence that there is no longer a threat to international peace and security and that meaningful justice and accountability mechanisms are in place in Sudan. In this respect the AU should assist by whatever reasonable means available to aid Sudan in securing justice and accountability. Indeed, Sudan and the AU have been put to that test by the High-Level Panel of Eminent Personalities headed by former South African president Thabo Mbeki. The panel was established by the AU in March 2009 to explore ways to secure peace, justice, and reconciliation in Darfur. The panel carried out its work for approximately six months and prepared a comprehensive report.<sup>151</sup> Mbeki in his own words has explained that ‘the Panel recommends that with the agreement of the Sudanese parties, the African Union should appoint judges and investigators from outside Sudan who would help their Sudanese counterparts to investigate, prosecute and adjudicate the war and other crimes committed during the Darfur conflict’.<sup>152</sup>
  
- 4) To the extent that African states are dissatisfied with the prosecutor’s current policy in respect of prosecutions, they should be encouraged to call for a revision of this prosecutorial policy. In that regard states should call for a working group to be established on the OTP’s prosecution policy. That working group might consider the following options as tentative suggestions by African states parties: a revision of the Rome Statute to include the addition of other factors that the prosecutor should consider when exercising his discretion not to investigate or prosecute, in the interests of justice, under article 53 of the Statute; or the adoption by the Assembly of States Parties of guidelines which the prosecutor should take into account in exercising these functions.

In order for such a working group to be apprised of African concerns about the peace–justice debate in relationship to the ICC’s work on the continent, African states parties should

be encouraged to prepare as soon as possible a policy paper suggesting a broader set of circumstances in which investigation or prosecution would not be in the interests of justice under the Rome Statute.

## CLAIM 3: THE SECURITY COUNCIL'S DOUBLE-STANDARD

### Concerns about the Security Council's skewed politics

Increasingly now in the forefront of international political discourse around the ICC, certainly within the AU, is the fact that international criminal justice is subject to the uneven and imbalanced landscape of global politics. For Africa, a key concern in this regard is the relationship between the Security Council and the ICC, specifically the council's powers of referral and deferral under the Rome Statute (articles 13 and 16). The skewed institutional power of the Security Council creates an environment in which it is more likely that action will be taken against accused from weaker states than those from powerful states, or those protected by powerful states. Thus the perception is that by referring the Darfur situation to the ICC but not acting in relation to, for instance, Israel, the council – through certain influential members – is guilty of double-standards.

This imbalance fuels concerns that international criminal justice mechanisms threaten state sovereignty. This concern also applies to the ICC which, although being a treaty body, is still subject to the chapter VII referral and deferral powers of the Security Council. And although the Rome Statute restricts the jurisdictional reach of the ICC (thereby making investigations in Iraq and Gaza difficult), these structural limitations in the architecture of international criminal justice are far less pronounced in the face of Security Council power to refer and defer situations to the ICC.

The primacy of this issue for Africa is clear from several recent and worrying developments.

First, the flood of criticism about the ICC's work on the continent came after the prosecutor's announcement in June 2008 that he would be seeking an indictment for President al-Bashir of Sudan following the Security Council's 1593 referral of the Darfur situation to the ICC. These decisions not only brought to the fore the inherent defects within the council – defects which for a

long time African and other states have complained about – but the controversy was heightened because Sudan is not a state party to the ICC, yet non-state parties on the council (most notably the United States) voted for or refrained from vetoing the referral (and have the power to refuse deferral).

The irony of the United States' position cannot go unnoticed. It will be recalled that just short of two weeks after the ICC's statute became operative on 1 July 2002, and before the court itself had opened its doors, article 16 of the Rome Statute was being invoked by none other than Washington. Resolution 1422 was adopted by the Security Council at its 4572nd meeting, on 12 July 2002. It was adopted by the vote of all 15 members, including seven states parties to the statute, including two permanent members, France and the United Kingdom. The preamble declares that the council is 'Acting under Chapter VII of the Charter of the United Nations'. The resolution in paragraph 1 directly refers to article 16 of the Rome Statute:

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise ...

It is well known that adoption of the resolution was provoked by the threat of the United States, in June 2002, to veto renewal of the mandate of the United Nations mission in Bosnia and Herzegovina.<sup>153</sup> Resolution 1422 would expire after 12 months, and on 12 June 2003, at its 4772nd meeting, the resolution was renewed for a further 12 months by the council's adoption of resolution 1487, which is essentially identical to resolution 1422. The council expressed its intention, as it had done the previous year, to renew the resolutions 'under the same conditions each 1 July for further 12-month periods for as long as may be necessary'. Only 12 members voted in favour of the resolution, however. Germany, France and Syria all abstained.

Many statements from governments regarding these controversial resolutions were highly critical. Some cited the 'deep injustice' of discrimination between peacekeeping forces from sending states that are parties to the Rome Statute

and those that are not.<sup>154</sup> It was further argued that the resolutions sought to modify the terms of the Rome Statute indirectly, without amendment of the treaty.<sup>155</sup>

These statements demonstrate the politicised nature of article 16 and the Security Council's invocation thereof at the behest of – and under threat by – a veto-wielding superpower. As one leading international criminal text summarises:

The purpose of [article 16] was to allow the Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding; if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace. The suspension of the proceedings would be only temporary. The subsequent practice of the Council quoting Article 16 would however have surprised those drafting the Statute.<sup>156</sup>

If anything positive may be drawn from the United States' purported political abuse of article 16, they are the clear statements by others at the time of the legal parameters of article 16. For example, in the Security Council, during the debate on resolution 1487, a number of states referred to the *travaux préparatoires* to indicate the real intent of the drafters of article 16 of the Rome Statute:

Article 16 reads that 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect'. From both the text and the *travaux préparatoires* of this article follow that this article allows deferrals -only on a case by case basis; -only for a limited period of time; -and only when a threat to or breach of peace and security has been established by the Council under Chapter VII of the UN Charter. In our view, article 16 does not sanction blanket immunity in relation to unknown future events.<sup>157</sup>

The next time article 16 came expressly to be referred to by the Security Council was in the context of the Darfur referral.<sup>158</sup> When the council referred the

Darfur situation to the ICC in 2005 by resolution 1593, there was a reference to article 16 in the second paragraph of the resolution:

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect.

It is again well known that that the reference was imposed by the United States as a prerequisite for its abstention when the vote was taken. The US ambassador at the time had this to say about the section's objectives:

This resolution provides clear protections for United States persons. No United States persons supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution.<sup>159</sup>

Of course, whatever the reasons may have been for the reference to article 16 in resolution 1593, article 16 henceforth came to be invoked directly by the AU in its response to the ICC's investigation in Sudan. One of the complaints forcefully directed by the AU at the ICC's work in Africa is that the court is undermining rather than assisting African efforts to solve the continent's problems. In this regard the Sudan referral is an illustrative example. The Sudan referral has become a touchstone for arguments around an article 16 deferral because of the decision by the ICC prosecutor to indict al-Bashir. This in part appears to be a central reason why most African states have been pushing for the Security Council to defer the prosecution of al-Bashir.

This call has been repeated at the highest levels of the AU. For instance, the AU Peace and Security Council called upon the Security Council to apply article 16 of the Rome Statute and 'defer the process initiated by the ICC'.<sup>160</sup>

The response of the Security Council has been merely to 'note' the AU's calls. For instance, the matter was considered by the council when it extended the mandate of UNAMID, the AU-UN Hybrid Operation in Darfur established by resolution 1769, for a further 12 months to 31 July 2009. In the extension resolution – resolution 1828 – adopted on 31 July 2008 with 14 votes in favour (with the US abstaining), the council '[e]mphasis[es] the need to bring to justice

the perpetrators of .... Crimes and urg[es] the Government of Sudan to comply with its obligations in this respect’.

The council thereafter took ‘note’ of the AU communiqué of 21 July 2009, ‘having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further’.<sup>161</sup>

This has drawn the ire of the AU. At a meeting of African states parties to the Rome Statute from 8-9 June 2009 the states parties agreed that ‘another formal resolution should be presented by the Assembly of Heads of State and Government to the United Nations Security Council to invoke Article 16 of the Rome Statute by deferring the Proceedings against President Bashir of The Sudan as well as expressing grave concern that a request made by fifty three Member States of the United Nations has been ignored’.<sup>162</sup> The peak of its response was a decision in Sirte, Libya on 3 July 2009 of the Assembly of the AU in which it stated that because:

The request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.<sup>163</sup>

It also expressed its ‘deep regret’ that the request by the AU to the Security Council to defer the proceedings against al-Bashir in accordance with article 16 of the Rome Statute has ‘neither been heard nor acted upon, and in this regard, REITERATES ITS REQUEST to the UN Security Council’.<sup>164</sup>

In its press release following the 3 July 2009 decision in Sirte on non-cooperation with the ICC, the AU explained that its decision, ‘bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonized approach to justice and peace, neither of which should be pursued at the expense of the other’.<sup>165</sup> Accordingly, continued the press release, the 3 July decision ‘should be received as a very significant pronouncement by the supreme AU decision-making body and a balanced expression of willingness to promote both peace and justice in Darfour (sic) and in The Sudan as a whole’ and ‘[i]t is now incumbent upon the United Nations Security Council to seriously consider the request by the AU for

the deferral of the process initiated by the ICC, in accordance with Article 16 of the Rome Statute’.

Then at meetings of states parties called by the AU in June and November 2009, the problematic role of the council was one of the few issues around which there was consensus. The role of the Security Council was the main concern at the AU Experts Meeting (3-5 November 2009) with the subsequent AU Ministerial Meeting (6 November 2009) recommending that article 16 be amended to allow the UN General Assembly (under the Cold War ‘Uniting for Peace’ resolution) to ‘exercise such power in cases where the Security Council has failed to take a decision within a specified time frame...’. The reasoning was that the General Assembly is more representative of the world community than the council.

Although the 8th ASP did not adopt the proposal to include the AU’s recommendation regarding article 16 on the agenda of its first review conference, the issue remains up for discussion at the 9th meeting of the ASP in December 2010. That the AU will be pushing the issue is apparent from the AU summit decision in January 2010,<sup>166</sup> in which the Assembly amongst other things welcomed ‘the submission by the Republic of South Africa, on behalf of the African States Parties to the Rome Statute of the ICC of a proposal which consisted of an amendment to Article 16 of the Rome Statute in order to allow the United Nations (UN) General Assembly to defer cases for one (1) year in cases where the UN Security Council would have failed to take a decision within a specified time frame’, and underscored ‘the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded’. The Assembly further in that document expressed its ‘deep regret’ at the fact that ‘the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon, and in this regard, **REITERATES** its request to the UN Security Council’.

At its most recent summit in July 2010 in Kampala, these AU positions on amending article 16 as well as the call for the Security Council to defer proceedings against al-Bashir were reiterated in strong terms: the AU’s Kampala decision stressed African governments’ concerns about the negative impact of the ICC’s arrest warrant for al-Bashir on the peace processes in the Sudan; reiterated the AU’s previous decision that all 53 AU member states ‘shall not

cooperate' with the court in respect to the arrest and surrender of the Sudanese leader; registered continued disappointment that the Security Council has failed to act on the AU's request to defer for one-year the ICC proceedings against al-Bashir; and, finally, urged African states to speak with one voice on the AU's November 2009 proposal to amend article 16 of the Rome Statute.

The decision that states would not cooperate with the ICC on the arrest of al-Bashir had not been repeated by the AU since it was first taken in Sirte last year. The July 2010 decision on the ICC breaks 12 months of silence from the AU on this controversial matter by re-stating that the all AU member states 'shall not cooperate' with the court in this regard. The decision goes even further in its requirement that member states balance their obligations to the ICC with those to the AU, and the rejection (for now) of the establishment of the ICC-AU liaison office in Addis Ababa. This latest intransigence no doubt stems directly from states' concerns about the al-Bashir indictment, which in turn invokes the problems with the Security Council's role in ICC business, especially when the target is a sitting head of state.

## The appropriate legal response

It is thus clear that the AU, driven by powerful interests, wants its calls for a deferral to be taken seriously – in fact acceded to. It has expressed its call as a preference for African solutions to African problems; and in particular for African peace efforts not to be undermined by the ICC. But there is no doubt that the AU's criticisms of the ICC's involvement in Sudan stem in great measure from a central problem of the United Nations: the skewed politics of the Security Council. Because of the council's legitimacy problem, many states see its work as a cynical exercise of authority by great powers. The problem is not helped by the fact that article 16 was controversially invoked for the first time just days after the court's statute became operative on 1 July 2002 to protect the US – a non-state party's – peacekeepers from prosecution.

The Security Council's engagement with article 16 since the Rome Statute became operative will have exacerbated rather than softened those impressions. And the result for the world's first permanent international criminal court? The

result is that the uneven political landscape of the Security Council has become a central problem of the ICC. Put differently, the work of the court has become infected with the double-standard of the council.

The first point worth noting is that notwithstanding the problems with the Security Councils' composition, its role within the scheme of the Rome Statute was foreseen and voluntarily agreed to by 31 African states parties who have ratified the statute, and by all the states that were at Rome and who played a role in drafting the statute in 1998.

Second, it also does not help that African critics appear ready to conflate their (justified) criticism of the Security Council's politics and composition with (unjustified) attacks against the ICC for investigations that proceed from a council referral. It needs to be stressed that the ICC is not responsible for the Sudan referral coming to it – but now that the referral has been made it has a legal duty under the Rome Statute to respond thereto. No doubt Israeli, US, or the abuses of other states call for an international response. But to attack the ICC for the failure of the Security Council to secure investigations is to choose the wrong whipping boy. And to denounce the justified referral of the Sudan crisis to the ICC for investigation is an unfortunate failure by African leaders to recognise that rarest of examples: the Security Council overcoming its own institutional and political deficiencies to the benefit of African victims of massive human rights violations.

That leads to the third point, which is that referral by the Security Council is a crucial element of the ICC's ability to ensure justice for serious crimes no matter where they are committed: Security Council referrals allow crimes committed on the territory of non-states parties to come under the ICC's jurisdiction. At the same time, following a Security Council referral, the ICC prosecutor is obliged by the Rome Statute to make an independent determination as to whether to proceed with an investigation (which determination is subject to oversight by judges in the pre-trial chamber).

These points notwithstanding, the power of the council to refer matters to the ICC with the concomitant power to decide on deferral of matters under article 16 of the Rome Statute remains a real problem, especially for African states and the AU.

## Recommendations

As recent events make plain, concerns about the role of the Security Council are unlikely to diminish in importance for African leaders and governments, especially in light of the recommendations of the AU Panel on Darfur, and the most recent AU summit decision on the ICC. Moreover, as long as these concerns remain unattended, they could deter African states from ratifying the Rome Statute, thus undermining the quest for universality.

What exactly Africa wants on this issue is however unclear, considering that most African states parties appeared not to support the tabling of the AU's article 16 amendment recommendation at the 8th ASP. This (in)action shows the necessity of dialogue and consensus building among African states parties (within and outside the forum of the AU) on the issue. That dialogue should proceed on the basis of a proper understanding of the law and with an appreciation of the possibilities and impossibilities (at least currently) regarding Security Council reform. The following points of debate might inform the discussion:

- 1) Security Council deferrals under article 16 of the Rome Statute should be avoided if possible, and if utilised then only in exceptional circumstances where the gravity of the offences and the impunity afforded to perpetrators necessitates an international prosecutorial response. The credibility of the ICC as a judicial institution demands that the ICC be protected from external influence and deferrals allow a political body to impose decisions on the ICC. Deferrals also increase the possibility that prosecutions will not take place, as the Sudan situation disquietingly demonstrates.
- 2) As stated in the SADC principles, 'while recognising the role of the Security Council in maintaining international peace and security[,] the independence and operations of the Court and its judicial functions must not be unduly prejudice[d] by political considerations'. This same principle should apply to other political bodies, including the AU, to preserve and promote the ICC's independence. Irrespective of a position on the appropriateness of

Security Council deferrals, regional decisions on deferrals should not be a basis for withholding cooperation with the court. This would undercut the ICC's real or perceived ability to operate independently and impartially carry out its functions by making the court dependent on decisions of political bodies that it does not control. Furthermore, states parties have an international treaty obligation under the Rome Statute to cooperate with the ICC, and decisions by regional bodies such as the AU that undermine the duty of cooperation place such states in an invidious position.

- 3) While regional decisions on deferrals, especially in cases involving senior officials, risk allowing outside forces to interfere with the court's judicial work, other types of 'regional input', however, can be valuable to fairly and effectively ensuring justice for serious crimes. One key area is promoting greater ratification of the ICC's Rome Statute. Comprehensive ratification is the best way to ensure that the ICC can prosecute serious crimes in all parts of the world and promote the more even application of the law. African ICC states parties should call for the AU to develop a plan to promote widespread ratification of the Rome Statute within and beyond Africa.
- 4) A further key area for 'regional input' relates to cooperation with the ICC. As the court lacks a police force to enforce its judicial orders, the ICC is reliant on cooperation by states and intergovernmental institutions. African ICC states parties should call for the AU to facilitate greater cooperation between the AU and the ICC by ensuring that the ICC-AU liaison office in Addis Ababa is established and that an agreement between the AU and the ICC on cooperation is finalised. These are two measures which have been taken by the United Nations with positive results. African states parties should also call for the AU to extend an invitation to the ICC to sessions of the AU Assembly. This can help promote more effective cooperation, but also understanding and discussion of concerns between the AU and the ICC.

## CLAIM 4: THE APPARENT IMPUDENCE AND IMPRUDENCE OF INDICTING A SITTING HEAD OF STATE

Another obvious difficulty with the al-Bashir indictment – and one which has been raised as a concern by the AU – is that of head of state immunity.

### Immunity under the Rome Statute

The Rome Statute has what at first appear to be conflicting provisions on immunity. Article 27(1) makes clear that functional immunity is inapplicable to any individual before the ICC, making specific reference to heads of state and government. In addition, article 27(2) makes clear that the traditional doctrine of personal immunity for sitting state officials also does not apply. This latter provision is not found in the statutes of any of the earlier international criminal tribunals, and thus is unique to the ICC. Article 98(1), however, provides that a state is *not* obligated to hand an individual over to the court if doing so would be ‘inconsistent with its obligations under international law with respect to the State or diplomatic immunity of a person...of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity’.

While some see these two provisions (articles 27 and 98(1)) as in conflict, the two provisions may, and should, be interpreted to complement each other.<sup>167</sup> The two articles complement each other if article 27 is interpreted to constitute a waiver by a state party of any immunity (both personal and functional) that might otherwise apply to their officials before the ICC, and article 98(1) is interpreted to apply only in the case of officials from a state that is *not* a party to the Rome treaty. Article 98(1) would thus apply with respect to officials whose state has not waived their immunity through article 27, thus requiring the ICC to seek a waiver with respect to such an official.

Thus it should be stressed that article 27 of the Rome Statute provides that the ‘official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.’ The position of international law immunities before national courts is however less obvious. For instance, in the groundbreaking *Pinochet* cases the House of Lords accepted that serving international functionaries (such as current heads of state) retain absolute immunities *rationae personae* (i.e. personal immunity on account of

their status), irrespective of the nature of the crime alleged, unless waived by the sending state. Their Lordships denied immunity to Pinochet in his capacity as a *former* head of state. However, their Lordships made it clear that if he had still been an acting head of state, this immunity in international law would have continued to subsist.<sup>168</sup>

The International Court of Justice has affirmed this immunity in its decision in *Democratic Republic of Congo v Belgium*.<sup>169</sup> With regard to the provisions precluding immunity found in the constitutive instruments of a myriad of international criminal tribunals (the most recent being the Rome Statute of the ICC), the court expressly held that this exception to customary international law was not applicable to national courts.<sup>170</sup> This case law therefore suggests that the diplomatic or head of state immunity of an accused prevents national courts from dealing with allegations of international crimes unless that immunity has been waived, or the senior official has left office.

This lack of clarity is particularly problematic in light of the fact that national courts of states parties to the Rome Statute are expected to act in a ‘complementary’ arrangement with the ICC, prosecuting individuals for ICC crimes and deferring to the ICC only when the national state is unwilling or unable to perform its prosecutorial role.

The ICC’s two-tier immunity structure: There is thus created a two-tier immunity structure for state officials before the ICC: one for officials from states that are a party to the Rome Treaty, and one for officials from states who are not parties. For officials from state parties, neither functional nor personal immunity applies with respect to any proceeding connected to the ICC, as the state has waived any rights such officials may have to such immunities through Article 27. For officials from non-state parties, since those states have not ratified the Rome Treaty they have not, as a matter of treaty law, waived any otherwise applicable immunities enjoyed by their officials. Article 98(1) thus applies to their officials. In such a case the Court would have to secure from a non-State party the waiver of its official’s immunity before a third state is obligated to hand that individual over to the ICC.<sup>171</sup>

Of course, the case of al-Bashir also raises complex questions, since in that case although Sudan is not a party to the Rome Statute, the case arises out of a Security Council referral.

However, there is strong academic support for the idea that all states – including non parties – are bound to accept that the ICC can act in accordance with its statute, and that it can oust the immunity ordinarily accorded under international law to the head of state. The argument goes as follows:<sup>172</sup>

- The Security Council's decision to confer jurisdiction on the ICC, being (implicitly) a decision to confer jurisdiction in accordance with the statute must be taken to include every provision of the statute that defines how the exercise of such jurisdiction is to take place.
- Article 27 is a provision that defines the exercise of such jurisdiction in that it provides that 'immunities ... which may attach to the official capacity of a person, whether under international law or national law, shall not bar the Court from exercising jurisdiction over a person'. The fact that Sudan is bound by article 25 of the UN Charter and implicitly by Security Council resolution 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the statute.
- The only difference is that Sudan's obligations to accept the provisions of the statute are derived not from the statute directly but from a Security Council resolution and the Charter.
- On this view, the immunities of Sudanese officials including of the Sudanese president are removed by article 27 thus meaning that under article 98, the ICC is not barred from requesting arrest and surrender from Sudan, even though Sudan is not a party to the Rome Statute.

## Recommendations

Notwithstanding the academic authority suggesting that al-Bashir's immunity has been removed by the Rome Statute, there is as yet no definitive ruling from the ICC on the relationship between articles 27 and 98 of the Rome Statute and the effect of those provisions for non-state parties.

It might thus be recommended that Sudan, other African states, and the AU consider participating before the ICC in the appeals proceedings concerning the decision to issue an arrest warrant against al-Bashir. In those proceedings the issue of the immunity of the Sudanese president and the impact of article 98 of the Rome Statute might be interrogated. That participation might occur either by way of an appeal under article 82(1) by al-Bashir himself (although such an appeal would now be out of time and condonation for the late filing would have to be sought), or by Sudan or other African states raising issues in respect of article 98 through rule 195 of the ICC's Rules of Evidence and Procedure, or possibly by Sudan, other states or the AU itself seeking to make submissions as *amicus curiae* in future proceedings before the court in terms of rule 103 of the Rules of Evidence and Procedure.

# 5 Conclusion

There is an opportunity in appropriate fora for African states meaningfully to make recommendations that might shape the future work of the ICC. In so doing, African states have an opening to call for changes and improvements to an international institution that they were integrally part of creating.

The recommendations suggested in this monograph are but a starting point. It is important to recall that the process of changing and improving an international institution requires meaningful and engaged debate. It is also not a process that happens overnight. While African states make the case for various changes to the ICC and its method of working, there remains much to be heartened about in the interim.

First, until the ICC's work expands, African nations – and most certainly African victims of horrifying crimes – have reason to celebrate rather than denounce the work of the court in its early years. As Desmond Tutu reminds:

Justice is in the interest of victims, and the victims of these crimes are African. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent.<sup>173</sup>

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC: more than half of all African states have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. The recent opposition in some African quarters to the ICC, an opposition that has been aggravated by the ICC prosecutor's decision to seek al-Bashir's indictment, has negatively affected these efforts.

It needs to be stressed that the reasons for such opposition (or at least the motivations of some who advance them) appear to reflect an outdated and defensive view of sovereignty as a trump to human rights and justice. This is not only inconsistent with advances in international human rights worldwide, it is also today – if one takes the AU's documents at face value – ironically un-African. The provisions of the AU's Constitutive Act suggest that human rights are to play an important role in the work of the organisation. For instance, the preamble speaks of states being 'determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law'.

As one of its central objectives, the AU recognises the need to 'encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights', and to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.<sup>174</sup> Member states are accordingly expected to promote gender equality and to have 'respect for democratic principles, human rights, the rule of law and good governance' and to respect the sanctity of life.<sup>175</sup>

Of obvious importance, given the peer review mechanism that exists under the AU, is the principled commitment by the AU under its Constitutive Act to condemn and reject 'unconstitutional changes of governments'.<sup>176</sup> There is thus a clear trend in the act towards limiting the sovereignty of member states and, in appropriate circumstances, permitting the involvement of the AU in the domestic affairs of African countries, notwithstanding the principle of non-interference by any member state in the internal affairs of another.<sup>177</sup> There is also the very clear commitment by African states in articles 4(m), 3(h) and 4(o) of the AU's Constitutive Act to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

The myths around the ICC's anti-African nature and its discriminatory singling out of African situations for investigation are an attack on an institution

that deserves support. One can hardly overestimate the importance of Africa to the court. The ICC's first 'situations' are all on the continent. Africa is a high priority for the ICC because African states, in the case of self-referrals by Democratic Republic of the Congo, Uganda and Central African Republic, chose so, and because the international community, through the Security Council, felt compelled to do something about a situation in Darfur that constitutes one of the world's worst humanitarian crisis. It is likely to remain a high priority for the foreseeable future, particularly in light of the prosecutor's recent decision to focus his attention on the post-election violence in Kenya. Africa is the most represented region in the ICC's Assembly of States Parties, and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peace-building efforts on the continent. However, the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC. As we have seen, the court's jurisdiction and capacity are limited so that it will be able to tackle a selection of only the most serious cases.

One danger is that the court's work in Africa and perhaps beyond Africa will be jeopardised by exaggerated claims about the ICC's unfair focus on Africa. If there is a lesson that might be drawn from the discussion herein it is this: there is a need in Africa for greater and more accurate public and official awareness of the work of the ICC, and a need for enhanced political support for the work of the court and for international criminal justice more generally.

The fulfilment of the aims and objectives of the ICC on the African continent – in particular through the complementarity regime – are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession and civil society. Meeting this need requires commitment to a collaborative relationship between these stakeholders and the ICC.

It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone. Other structures, such as the African Commission on Human and Peoples' Rights, the African Court of Justice and Human Rights and other pan-African institutions, can play a meaningful role in this regard, and should be encouraged to do so. An example is the work of the African Commission on Human and Peoples' Rights in its

2005 'Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC', in which the commission called on civil society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute.

That these African structures and organisations should be at the forefront of awareness raising is vitally important, not least of all because of the perception present in certain African states that international criminal justice and the ICC is an 'outside' or 'Western' priority and relatively less important than other political, social and developmental goals. The need for these structures and organisations to raise awareness is all the more acute in the current climate of myth-peddling and anti-ICC rhetoric.

While it is correct that all situations currently under investigation by the ICC are African, the more plausible reason for this reality is because African victims – the real beneficiaries of the court's work – outnumber victims of serious human rights violations in other parts of the world. And the accusation of 'unfair' prosecution of African situations is an insult to the careful screening process that the OTP has adopted in conformity with its obligations under the Rome Statute in order to determine whether there is a reasonable basis for initiating an investigation. These allegations ignore the objective fact that the ICC's systems promote transparency, oversight and accountability, for example, by requiring that judges of the court sit in oversight of the decisions of the prosecutor to investigate or not to investigate situations of alleged international criminal law violations.

It is imperative that Africa's 31 members of the ICC are encouraged to take seriously their obligations under the Rome Statute to ensure accountability for perpetrators, and that its 53 members of the AU are called to affirm rather than cheapen the organisation's commitment to eradicate impunity and ensure responsibility for perpetrators of crimes against humanity, war crimes and genocide. This effort is one that African victims of international crimes deserve. The ICC is an integral means by which Africans might end impunity on their continent. Civil society and others committed to the work of the ICC in Africa thus need urgently to proclaim the varied and compelling reasons why it can be trusted. A failure to do so means risking the court's work in Africa coming undone on the basis of misperceptions and inaccuracies.

This is a time for African voices, regional organisations and civil society to speak out against distortions regarding the ICC's work in Africa. Of course, that discussion must include criticism of the court's work where criticism is due, but with an understanding that the court's position in Africa is one that needs strengthening and nurturing. The Rome Statute allows for its own review and its rules and procedures allow for arguments to be made that may shape the ICC's work in a way most attractive to African states, NGOs and victims. These opportunities should be taken seriously, with sufficient planning and thought, and with a real commitment to justice for the victims of war crimes, crimes against humanity and genocide. There is thus much important work to be done so that the court may be improved in the pursuit of, or in response to, African interests – to ensure the ICC that Africa wants.



# Notes

- 1 William Schabas, *An Introduction to the International Criminal Court*, 3rd ed, Cambridge: Cambridge University Press, 2007, xi.
- 2 Schabas, *An Introduction to the International Criminal Court*, citing Robert C Johansen, A turning point in international relations? Establishing a permanent International Criminal Court, 13 Report No 1 (1997), Joan B Kroc Institute for International Peace Studies, 1.
- 3 See para 12 of the Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the ICC, Assembly/AU/Dec. 270(XIV).
- 4 For further information about the work of Dr Rwelamira at the court see the ICC Press Release dated 5 April 2006, <http://www.icc-cpi.int/press/pressreleases/139.html>.
- 5 Security Council Resolution 955 of 8 November 1994 and see generally C Scheltema and W van der Wolf (eds), *The International Tribunal for Rwanda: Facts, Cases, Documents*, (1999), The Netherlands: Nijmegen, 1999.
- 6 Judge Pillay's impressive work as a South African and as an international judge have been noted elsewhere. For example, see Cherie Booth and Max du Plessis, The International Criminal Court and victims of sexual violence, *South African Journal of Criminal Justice* 18(3) (2005), 241.
- 7 See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002.
- 8 Phakiso Mochochoko, Africa and the International Criminal Court, in E Ankumah and E Kwakwa (eds), *African perspectives on international criminal justice*, Ghana: Africa Legal Aid, 2005, 246.
- 9 Based in, among others, Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia.
- 10 Mochochoko, Africa and the International Criminal Court, 248.
- 11 Mochochoko, Africa and the International Criminal Court, 248. See also Sivu Maqungo, The establishment of the International Criminal Court: SADC's participation in the negotiations, *African Security Review* 9(1) (2000), available at <http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html>.

- 12 Maqungo, The establishment of the International Criminal Court.
- 13 Mochochoko, Africa and the International Criminal Court, 248-249.
- 14 Ibid, 250.
- 15 Schabas, *An introduction to the International Criminal Court*, 19.
- 16 The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The full text of the act is available at <http://www.info.gov.za/acts/2002/a27-02/>. The ICC act came into force in August 2002. For further information on the act see M du Plessis, Bringing the International Criminal Court home: The implementation of the Rome Statute of the International Criminal Court Act, *South African Journal of Criminal Justice* 16 (2003), 1.
- 17 Although customary international law forms part of South African law, a South African court confronted with the prosecution of a person accused of an international crime would have been hard pressed to convict, since the principle of *nullum crimen sine lege* would probably have constituted a bar to any such prosecution (see John Dugard, *International law: A South African perspective*, 2nd ed, Lansdowne: Juta, 2000, 142). The same principle would most likely have also put paid to prosecutions under the Geneva Conventions of 1949. South Africa has not incorporated the Geneva Conventions into municipal law nor, prior to the ICC act, enacted legislation to punish grave breaches. It would therefore have been unlikely for a South African court to try a person for a grave breach of the conventions in the absence of domestic legislation penalising such conduct (ibid).
- 18 During March 1998, at Kigali. See Lawrence Weschler, Exceptional cases in Rome: The United States and the struggle for an ICC, in Sarah Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court*, Lenham, USA: Rowman & Littlefield Publishers Inc, 2000, 91.
- 19 See Jonathan Charney, Progress in international criminal law, *American Journal of International Law* 93 (1999), 452 and fn 17. Mexico, Singapore, Sri Lanka, Trinidad, Tobago, and Turkey explained that they had abstained. See generally in this regard Kriangsak Kittichaisaree, *International Criminal Law*, Oxford: OUP, 36-37.
- 20 US suspends all military aid to South Africa, *Cape Times*, 2 July 2003.
- 21 *Agence France Press*, July 24 2003.
- 22 See for example Mohau Pheko, It seems the West's war crimes tribunals are reserved for Africans, *Sunday Times*, 27 July 2008. See also BBC Monitoring, Sudanese leader calls international court 'tool of imperialist forces', *Suna News Agency*, August 20 2008. See also Stephen Arthur Lamony, Africa and the International Criminal Court, Coalition for the International Criminal Court, 14 April 2009 (on file with author).
- 23 Consider for instance the statement by the chairperson of the AU Commission, Jean Ping, who reportedly expressed Africa's disappointment with the ICC in noting that rather than pursuing justice around the world – including in cases such as Colombia, Sri Lanka and Iraq,

the ICC was focusing only on Africa and was undermining rather than assisting African efforts to solve its problems. The BBC has quoted Ping as complaining that it was 'unfair' that all those indicted by the ICC so far were African. While reportedly confirming that '[the AU] is not against international justice', he has apparently lamented that '[i]t seems that Africa has become a laboratory to test the new international law'. See Vow to pursue Sudan over 'crimes', *BBC News*, 27 September 2008, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm>. See also M Mamdani, The new humanitarian order, *The Nation*, September 29 2008, <http://www.thenation.com/doc/20080929/mamdani> (accessed on 8 October 2008). Mamdani complains that: '[i]ts name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them'.

- 24 See Max du Plessis and Nicole Fritz, New diplomatic fiasco looms, *Business Day*, 2 May 2009.
- 25 Meeting of the AU in Addis Ababa, 8-9 June 2009.
- 26 Letter dated 8 July 2009 from the Minister of Foreign Affairs and International Cooperation of the Republic of Botswana to Justice Sany-Hyun Song, President of the ICC.
- 27 General Council of the Bar of South Africa Circular No 111/09, 15 July 2009.
- 28 South Africa may arrest Bashir if he attends World Cup, *Reuters*, 28 May 2010.
- 29 Uganda cautions al-Bashir over Kampala trip, *Mail & Guardian*, 16 July 2010.
- 30 Warrant 'subverts peace and solidarity' in Africa, *Business Day*, 26 July 2010, <http://www.businessday.co.za/articles/Content.aspx?id=115923> (accessed 10 August 2010).
- 31 AU chief challenges ICC to arrest Sudanese president, *Sudan Tribune*, 24 July 2010 <http://www.sudantribune.com/spip.php?article35748> (accessed 10 August 2010).
- 32 As we shall see further below, in fact the prosecutor of the ICC has indicated that his office is conducting analyses of several situations outside Africa – Colombia and Georgia amongst others have been or are under analysis. And we shall see too that the prosecutor has considered prosecution of crimes committed in Iraq, but declined to investigate and gave detailed reasons for that decision.
- 33 See Vow to pursue Sudan over 'crimes', *BBC News*, 27 September 2008, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (accessed 10 October 2008).
- 34 Mamdani, The new humanitarian order.
- 35 Ibid.
- 36 See Rwanda's Kagame says ICC targeting poor, African countries, AFP, July 31 2008; Rwandan President dismisses ICC as court meant to 'undermine' Africa, Rwanda Radio via *BBC Monitoring*, August 1 2008. See also Oraib Al Rantawi, A step forward or backward? Bitter Lemons, 32, 6, August 14 2008, available at <http://www.bitterlemons-international.org/inside.php?id=982> (accessed on 15 July 2010).

- 37 See Nicole Fritz, Black-white debate does no justice to a nuanced case, *Business Day*, 13 August 2008.
- 38 See for example Charles Jalloh, Regionalizing international criminal law?, *International Criminal Law Review* 9 (2009), 445–499 and Max du Plessis, The International Criminal Court and its work in Africa: Confronting the myths, *ISS Paper 173*, November 2008.
- 39 See Mochochoko, Africa and the International Criminal Court, 249.
- 40 See the Preamble to the Rome Statute of the International Criminal Court.
- 41 Robert H Jackson, *The Nurnberg case, as presented by Robert H. Jackson, 1947*, New York: Knopf Publishers Inc, 8.
- 42 Secretary-General observes International Day of Reflection on 1994 Rwanda Genocide, 7 April 2004, UN Press Document, available at <http://www2.unog.ch/news2/documents/newsen/sg04003e.htm>, accessed 10 May 2010.
- 43 Navi Pillay (South Africa) (who has recently resigned to take up the position of UN High Commissioner for Human Rights), Akua Kuenyehia (Ghana), Fatoumata Dembele Diarra (Mali) and Daniel Ntanda Nsereko (Uganda).
- 44 See Mochochoko, Africa and the International Criminal Court, 243. See also Fatou Bensouda and Hassan Jallow, International criminal law in an African context', in Max du Plessis (ed), *The African guide to international criminal justice*, Pretoria: Institute for Security Studies, 2009. I have drawn extensively on the chapter by Bensouda and Jallow in describing the Africa-heavy involvement in the lead up to the Rome Statute and during the Rome Conference itself.
- 45 Mochochoko, Africa and the International Criminal Court, 246.
- 46 Ibid, 248.
- 47 See generally Maqungo, The establishment of the International Criminal Court.
- 48 Mochochoko, Africa and the International Criminal Court, 250.
- 49 Schabas, *An introduction to the International Criminal Court*, 19.
- 50 For latest ratification status, see <http://www.iccnw.org>.
- 51 For status of African ratification, see <http://www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf>.
- 52 See <http://hrw.org/english/docs/2007/12/04/africa17466.htm>.
- 53 The practice of self-referrals is in some respects a practice encouraged by the OTP. The prosecutor has explained that self-referrals are encouraged as part of a 'policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court' (see OTP, Report on the activities performed during the first three years (June 2003 – June 2006), The Hague: ICC, 12 September 2006, 7. While the practice has been welcomed by some (see for instance Claus Kress, 'Self-referrals' and 'waivers of

complementarity': Some considerations in law and policy, *Journal of International Criminal Justice* 2 (2004), 945, it has also been criticised as allowing states to abdicate their responsibility to prosecute international crimes to the ICC (see for example Schabas, *An introduction to the International Criminal Court*, 150; and Paula Gaeta, Is the practice of 'self-referrals' a sound start for the ICC?, *Journal of International Criminal Justice* 2 (2004), 952. This debate, and the (to this author) valid concerns about self-referrals as an excuse for states to push to The Hague cases they should be prosecuting domestically, is beyond the scope of this monograph. The political and historical fact remains that each of the three self-referral cases discussed below involved a choice on the part of African states to cooperate with the ICC.

- 54 For more information on the decision to stay proceedings, see Human Rights Watch, International Criminal Court's trial of Thomas Lubanga 'stayed': Questions and answers, at <http://hrw.org/english/docs/2008/06/19/congo19163.htm>. The most recent developments in the decision on 8 July 2010 by ICC Trial Chamber I ordering to stay the proceedings in the Lubanga trial, considering that the fair trial of the accused was no longer possible due to non-implementation of the chamber's orders by the prosecution. The chamber had ordered the OTP to confidentially disclose to the defence the identity of intermediary 143. On 15 July 2010, ICC Trial Chamber I ordered the release of Thomas Lubanga. ICC judges argued that an accused cannot be held in preventative custody on a speculative basis, namely that at some stage in the future the proceedings may be resurrected. However, the order was not implemented with immediate effect. The prosecution was granted five days to file an appeal against this decision. That appeal was lodged and its effect is to suspend the chamber's release order. Thomas Lubanga will have to remain in detention until the appeals chamber makes a final decision. For further information and developments see <http://www.icc-cpi.int/cases/RDC.html>. The court's vigorous and independent oversight role in respect of the prosecutor is well evidenced by this development. See below for further discussion of the constraints placed upon the prosecutor by the Rome Statute, more particularly the oversight role of the pre-trial chamber of the court.
- 55 The ICC's factsheet on the case against Germain Katanga is available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-BckInfo-ENG.pdf>.
- 56 See International Criminal Court announces state referral from the Central African Republic, Coalition for the International Criminal Court, Media Advisory, January 10 2005.
- 57 A factsheet on developments in the Central African Republic investigation is available at [http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220\\_A\\_EN.pdf](http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf).
- 58 See further Schabas, *An introduction to the International Criminal Court*, 356.
- 59 For example, see [http://www.icc-cpi.int/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf).
- 60 Aside from obvious sources such as states parties (in the case of state party referrals) or the Security Council (in the case of Security Council referrals) the Rome Statute allows the prosecutor to take action *proprio motu* on the basis of information he has gathered from

- 'States, United Nations organs, intergovernmental or non-governmental organisations ... and other reliable sources that he or she deems appropriate', (Rome Statute, article 15(2)).
- 61 See Update on Communications received by the Office of the Prosecutor of the ICC, dated 10 February 2006 (see [http://www.icc-cpi.int/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf)).
- 62 See inter alia rules 46 and rule 49(1) of the International Criminal Court's Rules of Procedure and Evidence.
- 63 See [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html). See also Lynn Gentile, Understanding the International Criminal Court, in Du Plessis (ed), *The African Guide to the International Criminal Court*.
- 64 See OTP, Report on the activities performed during the first three years, 9.
- 65 Schabas, *An introduction to the International Criminal Court*, 163.
- 66 Copies of the prosecutor's decisions are available at [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html).
- 67 See Rome Statute article 53(1)(a).
- 68 Article 6, Rome Statute.
- 69 Article 7, Rome Statute.
- 70 See prosecutor's decision on Iraq, page 9, available at [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html).
- 71 Article 15(1) of the Rome Statute.
- 72 On the myth that the court has inclinations towards exercising a (politically or discriminatory) motivated form of universal jurisdiction, see further below.
- 73 According to this provision, the court is bound to find a case inadmissible where it is 'not of sufficient gravity to justify further action by the Court'. In addition, articles 53(1)(b) and 53(2) (b) of the Rome Statute refer to the admissibility test set out in article 17, indicating that in his or her determination as to whether there is a reasonable basis to initiate an investigation or a sufficient basis for a prosecution, the prosecutor must have regard to the article 17 criterion of gravity, among others.
- 74 The prosecutorial strategy of the OTP has been published and is available at [http://www.icc-cpi.int/otp/otp\\_events.html](http://www.icc-cpi.int/otp/otp_events.html).
- 75 Statement by Justice Louis Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, December 8, 1998, 7-8, quoted in Schabas, *An introduction to the International Criminal Court*, 159-160.
- 76 In Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A commentary - Volume 1*, Oxford: OUP, 2002, 620-621.

- 77 See Schabas, *An introduction to the International Criminal Court*, 163, and Rome Statute article 53(1)(a).
- 78 *Ibid*, 164.
- 79 See Rome Statute article 53(1)(c). Naturally these twin criteria of ‘gravity’ and ‘interests of justice’ will interact, and together they ‘provide enormous space for highly discretionary determinations’ by the ICC prosecutor (see Schabas, *An introduction to the International Criminal Court*, 164). But that is as an unavoidable consequence of creating a permanent international criminal court, and this ‘space’ is imperative in relation to the ICC prosecutor’s difficult task described by Arbour, of choosing ‘from many meritorious complaints the appropriate ones for international intervention’. Whatever the largesse of the prosecutor’s discretion in theory, in practice it is a discretion which must be justified by reference to the Rome Statute’s conditions and which is subject to review by the judges of the court (in relation to review by judges of the court, see immediately below).
- 80 Letter of Prosecutor dated 9 February 2006 (Iraq), 8 (on file with author).
- 81 A powerful example of this is the decision of the pre-trial chamber in relation to the Lubanga matter. See the discussion earlier at fn 51.
- 82 See Schabas, *An introduction to the International Criminal Court*, 239.
- 83 Article 53(2) of the Rome Statute.
- 84 Article 53(3)(a) of the Rome Statute.
- 85 Article 53(1)(c) of the Rome Statute.
- 86 Article 53(3)(b) of the Rome Statute.
- 87 See Stephanie Hanson, Africa and the International Criminal Court, Global Policy Forum, Council on Foreign Relations, July 24 2008, cited in Alexis Arieff et al, International Criminal Court cases in Africa: Status and policy issues, *Congressional Research Service Report*, September 12 2008, 3.
- 88 Article 11, Rome Statute.
- 89 Article 11(2), Rome Statute.
- 90 See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also P Kirsch and D Robinson, Trigger mechanisms, 623-625 in Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*. Not relevant here, but discussed further below, is the ICC prosecutor’s power under the Rome Statute in article 15 to initiate independent investigations on the basis of information received from any reliable source. The granting to the prosecutor of a *proprio motu* power to initiate investigations was one of the most debated issues during the negotiations of the Rome Statute. In the end, the drafters of the statute determined that in order for the prosecutor to exercise this power, the alleged crimes must have been committed by nationals of a state party or have taken place in the territory of a state party – the preconditions set out

in terms of article 12. It took the prosecutor some time to utilise his *proprio motu* powers, which he has now done to open an investigation into post-election violence in Kenya.

- 91 Available at [http://www.icc-cpi.int/pressrelease\\_details&id=19&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html). In respect of the Ugandan referral: 'In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord's Resistance Army to the Prosecutor of the International Criminal Court. ... President Museveni met with the Prosecutor in London to establish the basis for future co-operation between Uganda and the International Criminal Court' (available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html)). In respect of the Central Africa Republic referral: 'The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has received a letter sent on behalf of the government of the Central African Republic. The letter refers the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002, the date of entry into force of the Rome Statute' (available at [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html)).
- 92 See Amnesty International, Uganda: First ever arrest warrants by International Criminal Court – a first step towards addressing impunity, 14 October 2005, AI Index: AFR 59/008/2005; see also Schabas, *An introduction to the International Criminal Court*, 36.
- 93 In any event, it should be noted that the ICC has consciously taken steps to resist attempts to use the court for political ends. For instance, note the comments of the prosecutor immediately following the Uganda referral, to the effect that the OTP would investigate conduct by all parties to the conflict – this despite the wording of the referral, which mentions only the 'situation concerning the Lord's Resistance Army'.
- 94 See article 1 of the Charter and the decisions of the African Commission on Human and Peoples' Rights in *Commission Nationale des Droits de l'Homme et des Libertes v Chad* 55/91 Para 20, and *Amnesty International and Others v Sudan* 48/90, 50/91, 52/91, 89/93, Para 40.
- 95 See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* 137/94, 139/94, 154/96 and 161/97 Para 116.
- 96 See generally Schabas, *An Introduction to the International Criminal Court*; see also Ben Brandon and Max du Plessis (eds), *The prosecution of international crimes: A practical guide to prosecuting ICC crimes in Commonwealth States*, London: Commonwealth Secretariat, 2005.
- 97 The extent of cooperation required of states parties is evident from the fact that the OTP has a very wide mandate to 'extend the investigation to cover all facts' and investigate circumstances generally 'in order to discover the truth' (article 54(1)(a) of the Rome Statute).
- 98 See article 89, although article 97 provides for consultation where there are certain practical difficulties.
- 99 Article 17(1) of the Rome Statute.
- 100 Article 18(1) of the Rome Statute.
- 101 Article 15 the Rome Statute.

- 102 Article 18(2) the Rome Statute.
- 103 Article 17(2)(a) the Rome Statute.
- 104 A-M Slaughter, Not the court of first resort, *The Washington Post*, December 21 2003.
- 105 Report on Prosecutorial Strategy.
- 106 See further William W Burke-White, Proactive complementarity: The International Criminal Court and national courts in the Rome System of international justice, *Harvard International Law Journal* 49(1) Winter 2008, 53.
- 107 Cassese, *International Criminal Law*, 351.
- 108 Letter of Prosecutor dated 9 February 2006 (Iraq), cited in Schabas, *Introduction to the International Criminal Court*, 178.
- 109 Slaughter, Not the court of first resort.
- 110 See Desmond Tutu, Will Africa let Sudan off the hook?, *New York Times*, 2 March 2009, available at [http://www.nytimes.com/2009/03/03/opinion/03tutu.html?\\_r=1&scp=1&sq=Will%2Africa%20Let%20Sudan%20Off%20the%20Hook&st=cse](http://www.nytimes.com/2009/03/03/opinion/03tutu.html?_r=1&scp=1&sq=Will%2Africa%20Let%20Sudan%20Off%20the%20Hook&st=cse); see also Secretary-General observes International Day of Reflection on 1994 Rwanda Genocide.
- 111 See for detail Jemima Njeri Kariri and Anton du Plessis, The ICC offers a glimmer of hope for justice in Kenya, *ISS Today*, 20 April 2010, available at [http://www.iss.co.za/iss\\_today.php?ID=932](http://www.iss.co.za/iss_today.php?ID=932).
- 112 For further detail see Human Rights Watch, ICC: Judges approve Kenyan investigation, 31 March 2010, available at <http://www.hrw.org/en/news/2010/03/31/icc-judges-approve-kenyan-investigation>.
- 113 The decision is available at <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>.
- 114 See OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, 1 April 2010, available at <http://www.icc-cpi.int/NR/exeres/6B518FB1-C68F-405A-887C-19CEACF91C05.htm>.
- 115 A problem the court is attempting to redress, for instance, on 31 March 2010 the court launched an ICC YouTube site to create more accessibility to the ICC and its activities.
- 116 See further John Dugard, Take the case, *New York Times*, July 23 2009.
- 117 These concerns have been raised in other contexts. The indictment of President Slobodan Milosevic in 1999 by an international tribunal brought threats of destabilisation and defiance. But two years later the Kosovo war had ended and Milosevic was in the dock in The Hague before the ICTY. When, in 2003, the UN-backed Special Court for Sierra Leone brought charges against former Liberian president Charles Taylor, many predicted mayhem in west Africa. Taylor at first sought refuge in Nigeria, but when his hosts came under pressure to hand him over he 'disappeared' but was later arrested reportedly on the Nigerian border with a stash of US dollars. He is now in custody before the SCSL and today Liberia is striving to

- be a peaceful, democratic state. See further Human Rights Watch, *Selling justice short: Why accountability matters for peace*, New York: Human Rights Watch, 7 July 2009.
- 118 African Union Press Release, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Addis Ababa 14 July 2009.
- 119 Report of the International Commission of Inquiry on Darfur, Geneva, January 25 2005. The full report is available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).
- 120 Report of the International Commission of Inquiry on Darfur.
- 121 Ibid, paras 267 & 293.
- 122 Ibid, paras 268 & 296.
- 123 Ibid, para 360.
- 124 Ibid, para 568.
- 125 Detailed summaries of the crimes on which the OTP has gathered information and evidence can be found in the prosecutor's periodic reports to the Security Council on the investigation. They are available on the ICC's website available at [http://www.icc-cpi.int/cases/Darfur/s0205/s0205\\_un.html](http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html). For an analysis of the referral, see amongst others Max du Plessis and Christopher Gevers, Darfur goes to the International Criminal Court (perhaps), *African Security Review* 14(2) (2005), 23-34.
- 126 See *Prosecutor v Abu Garda*, Case No. ICC-02/05-02/09, Summons to Appear for Abu Garda (Under Seal), 7 May 2009, paras 1-20; and *Prosecutor v Abu Garda*, Case No. ICC-02/05-02/09, Decision on Prosecutor's Application under Article 58, Public Redacted Version, Pre-Trial Chamber I, 7 May 2009, 1-23.
- 127 See *Prosecutor v Abu Garda*, Case No. ICC-02/05-02/09, Decision on Confirmation of Charges, Public Redacted Version, 8 February 2010.
- 128 Copies of the warrants of arrest are available on the ICC's website, at <http://www.icc-cpi.int/cases/Darfur.html>.
- 129 Although Kushayb has long been in the custody of Sudanese authorities, allegedly on charges relating to Darfur (though not the same incidents charged by the prosecutor). See Darfur militia leader in custody, *BBC News Africa*, 13 October 2008, available at <http://news.bbc.co.uk/2/hi/africa/7666921.stm>.
- 130 See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, PTC I, 4 March 2009.
- 131 See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09, Appeals Chamber, 3 February 2010.
- 132 Report of the International Commission of Inquiry on Darfur, para 569.

- 133 Ibid, para 573.
- 134 Ibid, para 590.
- 135 Article 17(1) of the Rome Statute.
- 136 Article 18(1) of the Rome Statute.
- 137 Article 15 the Rome Statute.
- 138 Article 18(2) the Rome Statute.
- 139 Article 17(2)(a) the Rome Statute.
- 140 Article 53(1)(a), (b) and (c) of the Rome Statute respectively.
- 141 Report of the International Commission of Inquiry on Darfur, para 525.
- 142 Report of the Prosecutor of the International Criminal Court to the Security Council Pursuant to UNSCR 1593, 2005, 2.
- 143 Ibid, 3.
- 144 Ibid, 4.
- 145 Ibid.
- 146 For detail see Jakob Pichon, The principle of complementarity in the cases of the Sudanese nationals Ahmad Harun and Ali Kushayb before the International Criminal Court, *International Criminal Law Review* 8 (2008), 185–228.
- 147 This position is outlined in the OTP's policy paper on the interests of justice, available at [http://www.icc-cpi.int/otp/otp\\_docs.html](http://www.icc-cpi.int/otp/otp_docs.html).
- 148 See Ronald Slye, Immunities and amnesties, in Du Plessis (ed), *African Guide to International Criminal Justice*. And note that Human Rights Watch has argued in a policy paper that the phrase 'interests of justice' should be interpreted narrowly, and should not be used to decline an investigation or prosecution in the face of a national amnesty, truth commission, or other alternative justice system or process of reconciliation. Human Rights Watch, *The meaning of 'the interests of justice' in article 53 of the Rome Statute*, New York: Human Rights Watch, June 2005.
- 149 See Godfrey Musila, Beyond the al-Bashir arrest warrant, *The African*, June/July 2009, 25.
- 150 Ibid.
- 151 See further Human Rights Watch, AU: Back Mbeki Panel call for Darfur prosecutions, 29 October 2009, available at <http://www.hrw.org/en/news/2009/10/28/au-back-mbeki-panel-call-darfur-prosecutions>.
- 152 See speech by the Chairperson of the AU High-level Panel on Darfur, Thabo Mbeki, at the Summit Meeting of the AU Peace and Security Council: Abuja, Nigeria: October 29, 2009.

- 153 United States Developments, *American Journal of International Law*, 96 (2002), 725-727. See also the statement by the United States' representative at the Security Council's meeting of 10 July 2002 (UN Doc. S/PV/4568, 9-10). For academic comment on the subject, see inter alia Carsten Stahn, The ambiguities of Security Council Resolution 1422, *European Journal of International Law*, 14 (2003), 85 and Roberto Lavalle, A vicious storm in a teacup: The action by the United Nations Security Council to narrow the jurisdiction of the International Criminal Court, *Criminal Law Forum* 14 (2003), 195.
- 154 Uruguay, 12 June 2003.
- 155 Letter from the Ambassadors to the UN of Canada, Brazil, New Zealand and South Africa to the president of the Security Council in relation to the draft resolution 2.2002.747 currently under consideration by the Security Council under the agenda item Bosnia-Herzegovina, 12 July 2002, UN Doc. S/2002/754.
- 156 See Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An introduction to international criminal law and procedure*, Cambridge: CUP, 2007, 138.
- 157 UN Doc. S/PV.4772, 20.
- 158 See generally Annalisa Ciampi, The proceedings against President Al Bashir and the prospects of their suspension under article 16 of the ICC Statute, *Journal of International Criminal Justice* 6 (2008), 885-897.
- 159 Quoted in Goran Sluiter, Obtaining cooperation from Sudan – where is the law?, *Journal of International Criminal Justice* 6 (2008), 871-879.
- 160 See AU Peace and Security Council Decision (PSC/MIN/Comm (CXLII)), 21 July 2008, paras 3, 5, 9, 11(i); and thereafter AU Assembly Decision on the Application by the International Criminal Court Prosecutor for the Indictment of the President of the Republic of the Sudan (Dec. 221 (XII)), 3 February 2009, paras 2, 3; and Peace and Security Council Decision (PSC/PR/Comm (CLXXV)), 5 March 2009, paras 4-6.
- 161 See for example UN Doc. S/RES/1828 (2008).
- 162 See Recommendation 6 of the Report of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 8-9 June 2009, Addis Ababa, Min/ICC/Rpt.
- 163 Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc.Assembly/AU/13(XIII), para 10.
- 164 Ibid, para 9.
- 165 AU Press Release: Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Addis Ababa 14 July 2009.
- 166 Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC) DOC. Assembly/AU/8/(XIV), arising from the 14th Ordinary Session of the AU Assembly from 31 January to 2 February 2010.

- 167 For an extensive discussion of the different interpretations of these two provisions, see Dapo Akande, International law immunities and the International Criminal Court, *American Journal of International Law* 98 (2004), 419-432. Id. at 425 ('To give meaningful effect to Article 27, Article 98(1) must be interpreted as applying only to officials of nonparties'.) See also Paola Gaeta, Official capacity and immunities, in Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 993-4 (adopting a similar interpretation of article 98). Interestingly, it appears that articles 27 and 98 were drafted by different committees, and it is thus not clear how much, if any, thought was given to their potential inconsistency. See Akande, International law immunities and the International Criminal Court, 426 (citing Otto Triffterer, Article 27, in *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article*).
- 168 For instance, Lord Nicholls in the first Pinochet case held that '...there can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity' (see *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938). Lord Millett in the third Pinochet case said that 'Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him' (see *R v Bow St Magistrate, Ex p. Pinochet* (No.3) [1999] 2 WLR 824 at 905 H).
- 169 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) 2002 ICJ Reports 3.
- 170 Ibid, para 58.
- 171 See Ronald Slye, Immunities and amnesties, in Du Plessis (ed), *African Guide to International Criminal Justice*, 184.
- 172 See in particular Dapo Akande, The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities, *Journal of International Criminal Justice* 7(2) (2009), 333-352.
- 173 See Tutu, Will Africa let Sudan off the hook?.
- 174 Constitutive Act of the African Union 2000: articles 3(e) and (h).
- 175 Constitutive Act of the African Union 2000: articles 4(l), (m) and (o).
- 176 Constitutive Act of the African Union 2000: article 4(p).
- 177 Constitutive Act of the African Union 2000: article 4(g).

# Bibliography

- African Commission on Human and Peoples' Rights in *Commission Nationale des Droits de l'Homme et des Libertés v Chad* 55/91 Para 20.
- African Union Assembly Decision on the Application by the International Criminal Court Prosecutor for the Indictment of the President of the Republic of the Sudan (Dec. 221 (XII)), 3 February 2009, paras 2, 3.
- African Union Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc.Assembly/AU/13(XIII), 2009, para 10.
- African Union Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the ICC, Assembly/AU/Dec. 270(XIV), 2009.
- African Union Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC) DOC. Assembly/AU/8/(XIV), arising from the 14<sup>th</sup> Ordinary Session of the AU Assembly from 31 January to 2 February 2010.
- African Union Peace and Security Council Decision (PSC/MIN/Comm (CXLII)), 21 July 2008, paras 3, 5, 9, 11(i).
- African Union press release, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Addis Ababa 14 July 2009.
- Agence France Press*, July 24 2003.
- Akande, Dapo. International law immunities and the International Criminal Court. *American Journal of International Law* 98 (2004), 419-432.
- Akande, Dapo. The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities. *Journal of International Criminal Justice* 7(2) (2009), 333-352.
- Amnesty International and Others v Sudan* 48/90, 50/91, 52/91, 89/93, Para 40.
- Amnesty International, Uganda: *First ever arrest warrants by International Criminal Court – a first step towards addressing impunity*. AI Index: AFR 59/008/200514, October 2005.
- Arief, Alexis et al. International Criminal Court cases in Africa: Status and policy issues. *Congressional Research Service Report*, September 12, 2008, 3.

- Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*). ICJ Reports 3, 2002.
- BBC Monitoring. Sudanese leader calls international court ‘tool of imperialist forces. *Suna News Agency*, August 20 2008.
- Bensouda, Fatou and Jallow, Hassan. International criminal law in an African context. In Max du Plessis (ed), *The African guide to international criminal justice*. Pretoria: Institute for Security Studies, 2009.
- Booth, Cherie and du Plessis, Max. The International Criminal Court and victims of sexual violence. *South African Journal of Criminal Justice* 18(3) (2005), 241.
- Brandon, Ben and du Plessis, Max (eds). *The prosecution of international crimes: A practical guide to prosecuting ICC crimes in Commonwealth States*. London: Commonwealth Secretariat, 2005.
- Burke-White, William. Proactive complementarity: The International Criminal Court and national courts in the Rome System of international justice. *Harvard International Law Journal* 49(1) Winter 2008, 53.
- Cassese, Antonio et al (eds). *The Rome Statute of the International Criminal Court: A commentary – Volume 1*. Oxford: OUP, 2002, 620-621.
- Charney, Jonathan. Progress in international criminal law. *American Journal of International Law* 93 (1999), 452.
- Ciampi, Annalisa. The proceedings against President Al Bashir and the prospects of their suspension under article 16 of the ICC Statute. *Journal of International Criminal Justice* 6 (2008), 885-897.
- Constitutive Act of the African Union, 2000.
- Cryer, Robert, Friman, Hakan, Robinson, Darryl, et al. *An introduction to international criminal law and procedure*. Cambridge: Cambridge University Press, 2007, 138.
- Darfur militia leader in custody. *BBC News Africa*, 13 October 2008, available at <http://news.bbc.co.uk/2/hi/africa/7666921.stm>.
- du Plessis, M and Fritz, N. New diplomatic fiasco looms. *Business Day*, 2 May 2009.
- du Plessis, M. Bringing the International Criminal Court home: The implementation of the Rome Statute of the International Criminal Court Act. *South African Journal of Criminal Justice* 16 (2003), 1.
- du Plessis, Max and Gevers, Chris. Darfur goes to the International Criminal Court (perhaps). *African Security Review* 14(2) (2005), 23-34.
- du Plessis, Max. The International Criminal Court and its work in Africa: Confronting the myths. *ISS Paper* 173, November 2008.

- Dugard, John. *International law: A South African perspective*, 2<sup>nd</sup> ed. Lansdowne: Juta, 2000, 142.
- Dugard, John. Take the case. *New York Times*, July 23 2009.
- Fritz, Nicole. Black-white debate does no justice to a nuanced case. *Business Day*, 13 August 2008.
- Gaeta, Paola. Official capacity and immunities. In A Cassese et al (eds). *The Rome Statute of the International Criminal Court: A Commentary*. Oxford: OUP, 2002, 993-4.
- Gaeta, Paula. Is the practice of 'self-referrals' a sound start for the ICC? *Journal of International Criminal Justice* 2 (2004), 952.
- General Council of the Bar of South Africa. Circular No 111/09, 15 July 2009.
- Gentile, Lynn. Understanding the International Criminal Court. In Max du Plessis (ed). *The African Guide to the International Criminal Court*. Pretoria: Institute for Security Studies, 2009.
- Hanson, Stephanie. Africa and the International Criminal Court. Global Policy Forum, Council on Foreign Relations, July 24 2008.
- Human Rights Watch. AU: Back Mbeki Panel call for Darfur prosecutions, 29 October 2009, available at <http://www.hrw.org/en/news/2009/10/28/au-back-mbeki-panel-call-darfur-prosecutions>.
- Human Rights Watch. ICC: Judges approve Kenyan investigation, 31 March 2010, available at <http://www.hrw.org/en/news/2010/03/31/icc-judges-approve-kenyan-investigation>.
- Human Rights Watch. International Criminal Court's trial of Thomas Lubanga 'stayed': Questions and answers, available at <http://hrw.org/english/docs/2008/06/19/congo19163.htm>.
- Human Rights Watch. *Selling justice short: Why accountability matters for peace*. New York: Human Rights Watch, 7 July 2009.
- Human Rights Watch. *The meaning of 'the interests of justice' in article 53 of the Rome Statute*. New York: Human Rights Watch, June 2005.
- ICC press release, 5 April 2006, available at <http://www.icc-cpi.int/press/pressreleases/139.html>.
- International Criminal Court announces state referral from the Central African Republic, Coalition for the International Criminal Court, Media Advisory, January 10, 2005.
- International Pen and Others (on behalf of Saro-Wiwa) v Nigeria 137/94, 139/94, 154/96 and 161/97 para 116.
- Jackson, Robert H. *The Nurnberg case, as presented by Robert H. Jackson*. New York: Knopf Publishers Inc, 1947, 8.
- Jalloh, Charles. Regionalizing international criminal law? *International Criminal Law Review* 9 (2009), 445-499.

- Kirsch, P and Robinson, D. Trigger mechanisms. In A Cassese et al (eds). *The Rome Statute of the International Criminal Court: A Commentary*. Oxford: OUP, 2002.
- Kittichaisaree, Kriangsak. *International Criminal Law*. Oxford: OUP, 36-37.
- Kress, Claus. 'Self-referrals' and 'waivers of complementarity': Some considerations in law and policy. *Journal of International Criminal Justice* 2 (2004), 945.
- Lamony, Stephen Arthur. Africa and the International Criminal Court. Africa Outreach Liaison and Situations Advisor, Coalition for the International Criminal Court Tuesday, 14 April 2009.
- Lavalle, Roberto. A vicious storm in a teacup: The action by the United Nations Security Council to narrow the jurisdiction of the International Criminal Court. *Criminal Law Forum* 14 (2003), 195.
- Uganda cautions al-Bashir over Kampala trip. *Mail & Guardian*, 16 July 2010.
- Mamdani, M. The new humanitarian order. *The Nation*, September 29 2008, available at <http://www.thenation.com/doc/20080929/mamdani>.
- Maqungo, Sivu. The establishment of the International Criminal Court: SADC's participation in the negotiations. *African Security Review* 9(1) (2000), available at <http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html>.
- Mbeki, Thabo. Speech by the Chairperson of the AU High-level Panel on Darfur at the Summit Meeting of the AU Peace and Security Council. Abuja, Nigeria: October 29, 2009.
- Mochochoko, Phakiso. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds), *African perspectives on international criminal justice*, Ghana: Africa Legal Aid, 2005, 246.
- Musila, Godfrey. Beyond the al-Bashir arrest warrant. *The African*, June/July 2009, 25.
- Njeri Kariri, Jemima and du Plessis, Anton. The ICC offers a glimmer of hope for justice in Kenya, ISS Today, 20 April 2010, available at [http://www.iss.co.za/iss\\_today.php?ID=932](http://www.iss.co.za/iss_today.php?ID=932).
- OTP Press Conference on Kenya. Prosecutor Moreno-Ocampo's Statement, 1 April 2010, available at <http://www.icc-cpi.int/NR/exeres/6B518FB1-C68F-405A-887C-19CEACF91C05.htm>.
- OTP. Report on the activities performed during the first three years (June 2003 – June 2006). The Hague: ICC, 12 September 2006, 7.
- Peace and Security Council Decision (PSC/PR/Comm (CLXXV)), 5 March 2009.
- Pheko, Mohau. It seems the West's war crimes tribunals are reserved for Africans. *Sunday Times*, 27 July 2008.
- Pichon, Jakob. The principle of complementarity in the cases of the Sudanese nationals Ahmad Harun and Ali Kushayb before the International Criminal Court. *International Criminal Law Review* 8 (2008), 185–228.

Press Release of the Prosecutor of the International Criminal Court, No: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>.

*Prosecutor v Abu Garda*, Case No. ICC-02/05-02/09, Decision on Prosecutor's Application under Article 58, Public Redacted Version, Pre-Trial Chamber I, 7 May 2009, 1-23.

*Prosecutor v Abu Garda*, Case No. ICC-02/05-02/09, Summons to Appear for Abu Garda (Under Seal), 7 May 2009, paras 1-20

*Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, PTC I, 4 March 2009.

*Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09, Appeals Chamber, 3 February 2010.

Prosecutor's decision on Iraq, page 9, available at [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html).

Prosecutorial strategy of the OTP has been published and is available at [http://www.icc-cpi.int/otp/otp\\_events.html](http://www.icc-cpi.int/otp/otp_events.html).

*R v Bow St Magistrate, Ex p. Pinochet (No.3)* [1999] 2 WLR 824 at 905 H).

*R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938).

Rantawi, Oraib. Al, A step forward or backward?, *Bitter Lemons*, 32, 6, August 14 2008, available at <http://www.bitterlemons-international.org/inside.php?id=982> (accessed on 15 July 2010).

Report of the International Commission of Inquiry on Darfur, Geneva, January 25 2005. The full report is available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

Report of the Prosecutor of the International Criminal Court to the Security Council Pursuant to UNSCR 1593, 2005, 2.

South Africa may arrest Bashir if attends World Cup. *Reuters*, 28 May 2010.

Rome Statute of the International Criminal Court, 1998.

Rwanda's Kagame says ICC targeting poor, African countries. *AFP*, July 31 2008.

Rwandan President dismisses ICC as court meant to 'undermine' Africa. Rwanda Radio via *BBC Monitoring*, August 1 2008.

Schabas, William. *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed. Cambridge: Cambridge University Press, 2007, xi.

Scheltema, C and van der Wolf, W (eds). *The International Tribunal for Rwanda: Facts, Cases, Documents*. The Netherlands: Nijmegen, 1999.

- Secretary-General observes International Day of Reflection on 1994 Rwanda Genocide, UN Press Document, 7 April 2004, available at <http://www2.unog.ch/news2/documents/newsen/sg04003e.htm> (accessed 10 May 2010).
- Security Council Resolution 955, 8 November 1994.
- Slaughter, A-M. Not the court of first resort. *The Washington Post*, December 21 2003.
- Sluiter, Goran. Obtaining cooperation from Sudan – where is the law? *Journal of International Criminal Justice* 6 (2008), 871-879.
- Slye, Ronald. Immunities and amnesties. in Du Plessis (ed), *African Guide to International Criminal Justice*. In Max du Plessis (ed), *The African guide to international criminal justice*. Pretoria: Institute for Security Studies, 2009.
- Stahn, Carsten. The ambiguities of Security Council Resolution 1422. *European Journal of International Law*, 14 (2003), 85.
- Statement by the United States' representative at the Security Council's meeting of 10 July 2002 (UN Doc. S/PV/4568, 9-10).
- The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. available at <http://www.info.gov.za/acts/2002/a27-02/>.
- Tutu, Desmond. Will Africa let Sudan off the hook? *New York Times*, 2 March 2009, available at [http://www.nytimes.com/2009/03/03/opinion/03tutu.html?\\_r=1&scp=1&sq=Will%20Africa%20Let%20Sudan%20Off%20the%20Hook&st=cse](http://www.nytimes.com/2009/03/03/opinion/03tutu.html?_r=1&scp=1&sq=Will%20Africa%20Let%20Sudan%20Off%20the%20Hook&st=cse)
- UN Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002.
- United States Developments. *American Journal of International Law* 96 (2002), 725-727.
- Update on Communications received by the Office of the Prosecutor of the ICC, dated 10 February 2006, available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf).
- US suspends all military aid to South Africa. *Cape Times*, 2 July 2003.
- Vow to pursue Sudan over 'crimes'. *BBC News*, 27 September 2008, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (accessed 10 October 2008).
- Weschler, Lawrence. Exceptional cases in Rome: The United States and the struggle for an ICC. In Sarah Sewall and Carl Kaysen (eds). *The United States and the International Criminal Court*. Lenham, USA: Rowman & Littlefield Publishers, 2000, 91.



In May 2010, states parties to the Rome Statute of the International Criminal Court (ICC) met in Kampala, Uganda for the ICC's much anticipated first review conference. African governments and civil society used this opportunity to affirm their support for the Rome Statute system, but relations with the ICC remain uneasy. The past year has been the most tumultuous in the court's short life span. The flashpoint was the arrest warrant issued by the ICC for Sudanese President Omar al-Bashir on charges of crimes against humanity, war crimes and most recently, genocide, committed in the ongoing Darfur conflict.

The African Union's controversial decision not to cooperate with the ICC in the arrest and surrender of al-Bashir, and its repeated requests to the UN Security Council to defer ICC proceedings against the Sudanese president exemplify the political and legal complexities of Africa's current relationship with the court. ICC-Africa relations have clearly gone off-course. This monograph describes the early support for the ICC on the African continent, and then discerns and evaluates the criticisms of the court that have arisen within the AU. In proposing recommendations, the monograph concludes that there is much to be done to improve the court in the pursuit of African interests – to ensure the ICC that Africa wants.

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